Supreme Court, U.S.
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No. :_____

In The
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

Whether front pay is an element of compensatory damages under the Civil Rights Act of 1991.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Sharon B. Pollard, an individual citizen of the United States, residing in the Western District of Tennessee. Plaintiff has no corporate affiliations. Sharon B. Pollard was the Plaintiff in the District Court, and the Appellee/Cross Appellant in the Sixth Circuit Court of Appeals.

Respondent

E. I. DuPont de Nemours Company is a corporation, which is publicly traded. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of said corporation's stock. Respondent DuPont was the Defendant in the District Court, and the Appellant/Cross Appellee before the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorai to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A at 1a) is reported at 213 F.3d 933 (6th Cir. 2000), 200 FED App. 0174P (6th Cir. 2000). The District Court opinion (App. B at 27a) is reported at Pollard vs. E. I. DuPont de Nemours Co., 16 F.Supp. 2d 913 (W.D. Tenn. 1998).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on May 26, 2000. The Court of Appeals entered an order denying a timely petition for rehearing en banc on August 25, 2000 (App. C at 49a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment.

B. 42 U.S.C. § 1981a, Civil Rights Act of 1991.

42 U.S.C. § 2000e-5 (g), Section 706 (g) of the Civil Rights Act of 1964, provides that, as a remedy for unlawful employment discrimination, a court may award injunctive relief, reinstatement, back pay, or "any other equitable relief that the court deems appropriate."

The Civil Rights Act of 1991, codified at 42 U.S.C. § 1981a(a)(1), provides: "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5 [or § 2000e-16]) against a respondent who engaged in unlawful discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704 or 717 of the act (42 U.S.C. § 2000e-2 or 2000e-3 [or 2000e-16]) and provided that the complaining party cannot recover under § 1977 of the Revised Statutes (42 U.S.C. § 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)] from the respondent."

42 U.S.C. § 1981a(b)(2) provides: "Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under section 706 (g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]."

STATEMENT OF THE CASE

Sharon Pollard and her husband brought this action against her employer, DuPont, for continuing harassment based on her sex since 1987 under Title VII, and state torts, including outrageous conduct. The district court at bench trial found that Pollard was subjected to co-worker hostile work

environment sexual harassment, that her DuPont supervisors were well aware of the discrimination, and that it resulted in a medical leave of absence from her job for psychological reasons. She later was terminated for refusing to return to the same hostile environment.

The district judge awarded Pollard $107,364.00 in back pay and benefits, and $300,000.00 in compensatory damages. He noted that this amount was not sufficient to make her whole. He further noted that this was a case for punitive damages, but he could not award in excess of the $300,000.00. He further noted that the Sixth Circuit in the case of Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), ruled that front pay was subject to the statutory limitation of $300,000.00, and therefore he was not awarding front pay to Pollard; but for said limitation, he would have awarded additional damages.

DuPont appealed the district court decision to the Sixth Circuit. Pollard cross-appealed and argued, in part, that front pay is not subject to the statutory limitations under 42 U.S.C. Section 1981a.

The panel of judges assigned to the case ruled in Pollard's favor on the issues raised by DuPont, and agreed that the record demonstrated that DuPont employees engaged in flagrant discrimination based on gender and that DuPont managers and supervisors did not take adequate steps to stop it.

The Sixth Circuit panel further found that the arguments raised by Pollard as to whether front pay is subject to statutory limitations on compensatory damages were correct, "but our hands are tied." The panel ruled that it

could not overturn the decision of another panel of the court, namely Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997).

Pollard, therefore, timely petitioned for rehearing en banc, which was denied on August 25, 2000.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

In Hudson v. Reno, 130 F. 3d 1193 (6th Cir. 1997), cert. denied, 119 S. Ct. 64 (1998), a three-judge panel held that front pay is an element of compensatory damages subject to the statutory limitations set out in the Civil Rights Act of 1991, codified at 42 U.S.C. § 1981a (a)(b)(3)(D). Following said decision, Hudson requested en banc review by the Sixth Circuit, which was denied; the Supreme Court then denied certiorari. Hudson was one of the first appellate opinions to decide the front pay issue. Subsequently, all other courts of appeal which have heard the issue have decided that front pay is not subject to the statutory limitations under § 1981a, but instead is equitable relief available pre-1991.

Hudson is the controlling authority on this issue in the Sixth Circuit. The three-judge panel in the Pollard decision declined to over-rule Hudson, stating that such reversal would have to come from an en banc decision. The Sixth Circuit has now denied Sharon Pollard's application for en banc review.

The Eighth Circuit's decision is Kramer v. Logan County School District No. R-1, 157 F. 3d 620, 625-26 (8th Cir. 1998). The Tenth Circuit's decision is Medlock v. Ortho Biotech, Inc., 164 F. 3d 545, 556 (10th Cir. 1999). The District of Columbia Circuit's decision is Martini v. Federal National Mortgage Association, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999). The Ninth Circuit's decision is Gotthardt v. National Railroad Passenger Corp., 191 F. 3d 1148 (9th Cir. 1999). Two district court decisions are reported, which also reach a conclusion contrary to Hudson: Rivera v. Baccarat, Inc., 34 F. Supp. 2d 870, 878 (S.D. N.Y. 1999); Bizelli v. Parker Amchem, 17 F. Supp. 2d 949, 954 n.2 (E.D. Mo. 1998).

There is no logical way to reconcile the split of authority between the Sixth Circuit and the other circuits. This front pay issue is very significant. Persons working within the Sixth Circuit have greatly reduced claims, much different from persons in the rest of the country.

II.

THE DECISION OF THE SIXTH CIRCUIT IS INCORRECT.

A. § 1981a explicitly excludes remedies which were traditionally available under Title VII from the statutory limitations. 42 U.S.C. § 1981a(b)(2)

B. Prior to the 1991 Act, all circuits, including the Sixth Circuit, routinely treated front pay as an available equitable remedy. See Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991); Wilson v. S&L Acquisition Co., 940 F.2d 1429, 1438 (11th Cir. 1991); Powers v. Grinnell Corp., 915 F.2d 34, 42 (1st Cir. 1990);

Morgan v. Arkansas Gazette, 897 F.2d 945, 954 (8th Cir. 1990); Erebia v. Chrysler Plastic Prods. Corp., 891 F. 2nd 1212, 1214 (6th Cir. 1989); Wulf v. City of Wichita, 883 F.2d 842, 873 (10th Cir. 1989); Bruno v. W.D. Saunders Co., 882 F.2d 760, 772 (3rd Cir. 1989); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1201 (7th Cir. 1989); Cassino v. Reichhold Chem., Inc., 817 F.2d 1338, 1338 (9th Cir. 1987); Shore v. Federal Express, 777 F. 2d 1155, 1159 (6th Cir. 1985).

C. Legislative history of the Civil Rights Act of 1991 clearly indicates that front pay was not intended to be included as compensatory damages subject to the statutory limitations.

Senator Edward Kennedy announced in the Senate that a compromise had been reached on the Civil Rights Act of 1991, stating, ". . . [c]ompensatory damages do not include back pay, interest on back pay, or any other type of relief authorized under § 706 g of the Civil Rights Act of 1964, including front pay." Cong. Rec., § 15234 (Daily Ed. 10/25/91) (emphasis added). Representative Edwards in the House of Representatives stated, ". . . [d]amages awarded under [§ 1981a] cannot include remedies already available under Title VII, including back pay, the interest thereon, front pay, and any other relief authorized under Title VII." 138 Cong. Rec. H. 9527 (Daily Ed. 11/7/91) (emphasis added).

D. The purpose of front pay, as with other remedies, is to make the victim whole. Landgraf v. USI Film Producers, 511 U.S. 244 (1994). In enacting the Civil Rights Act of 1991, Congress intended to provide additional remedies beyond those traditionally available, and wished to impose a cap on the newly available remedies, i.e. compensatory and punitive damages. To apply the reasoning

of Hudson to the instant case, Sharon Pollard was better off under the pre-1991 law, because she could recover her back pay and benefits ($107,364) and front pay[1] and benefits (testimony by economist valued at approximately $800,000), whereas after the 1991 Act she was limited to $107,364 and $300,000. This result was not the intent of Congress.

III.

THE QUESTION PRESENTED IS IMPORTANT.

Congress enacted the Civil Rights Act of 1991 in order:

> "(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . . and
>
> (2) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Act Nov. 21, 1991, P.L. 102-166, § 3, 105 Stat. 1071, Civil Rights Act of 1991 (emphasis added).

Said Act further provides:

---

[1] The district court concluded that reinstatement of Pollard was impracticable in light of evidence presented; that her allegations of emotional difficulties surrounding potential reinstatement were credible; and therefore concluded that but for the cap under § 1981 he would have awarded front pay.

> "The Congress finds that - (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace. . ." Act Nov. 21, 1991, P.L. 102-166, § 2, 105 Stat. 1071, Civil Rights Act of 1991 (emphasis added).

The Sixth Circuit decision of Hudson, op. cit. is contrary to the Congressional purpose. It thwarts the intent to deter. It defeats the intent to provide additional remedies. It ignores the Sixth Circuit's own precedents, such as Roush v. KFC National Management Co., 10 F. 3d 392, 398 (6th Cir. 1993), cert. denied, 513 U.S. 808 (1994); and Shore v. Federal Express, 777 F.2d 1155, 1159 (6th Cir. 1985).

And, lastly, Hudson stands in the way of the trial court making Sharon Pollard whole. Indeed under the reasoning of Hudson the perpetrator is profiting, not the victim, by the enactment of § 1981a. This result is clearly contrary to Congressional intent, and to Sixth Circuit precedent, including Jackson v. City of Cookeville, 31 F.3d 1354, 1360 (6th Cir. 1994), citing Doyne v. Union Elec. Co., 953 F.2d 447, 451-452 (8th Cir. 1992).

IV.

THE DECISIONS OF THE SIXTH CIRCUIT ADVERSELY IMPACT MEMBERS OF PROTECTED CLASSES, AND ERADICATE THE BENEFITS OF THE CIVIL RIGHTS ACT OF 1991.

In our society the persons least able to protect themselves are persons who are members of protected classes,

such as African-Americans, women, pregnant persons, persons with disabilities, etc. Employers have many resources, and the abilities and resources to retain attorneys and defend actions. The Sixth Circuit decision of Hudson v. Reno impacts the weak and benefits the strong. Hudson eradicates the benefits of §1981a for persons working within the Sixth Circuit. Other circuit courts of appeal have decided the issue of front pay in a manner diametrically opposite to that of this Circuit. The Supreme Court needs to accept certiorari, and to bring the Sixth Circuit into compliance with the Civil Rights Act of 1991, other Circuit Courts of Appeal, and the clearly expressed Congressional intent of the Act in its formulation.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed May 26, 2000]

Nos. 98-6317 / 6319; 99-5125

Sharon B. Pollard,	)
Plaintiff-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
E. I. DuPont de Nemours	)
Company,	)
Defendant-Appellant/	)
Cross-Appellee.	)
	)

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 95-03010--Jon Phipps McCalla, District Judge.

Before: MERRITT, CLAY, and CUDAHY*, Circuit Judges.

* The Honorable Richard D. Cudahy, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

OPINION

MERRITT, Circuit Judge. Sharon Pollard and her husband brought this action against her employer, DuPont, for "continuing harassment based on her sex since 1987" under Title VII, as well as the common law injuries of intentional infliction of emotional distress, negligent supervision, and loss of consortium. The district court found that she was subjected to co-worker hostile work environment sexual harassment, that her DuPont supervisors were well aware of the discrimination, and that it resulted in a medical leave of absence from her job for psychological assistance and her eventual dismissal for refusing to return to the same hostile environment. We agree with the district court that the record demonstrates that DuPont employees engaged in flagrant discrimination based on gender and that DuPont managers and supervisors did not take adequate steps to stop it.

The claim of sexual harassment was tried before the court instead of a jury. Judge McCalla was so persuaded by Pollard's claim that in his order he concluded that "[t]his is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched." The court awarded Pollard $107,364 in back pay and benefits, $300,000 in compensatory damages, the maximum permitted by the statutory cap, and attorney's fees in the amount of $252,997.38. DuPont now appeals the court's decisions, arguing 1) that there was no harassment or discrimination based on gender and that the trial court's factual finding that DuPont had actual knowledge of and responded indifferently to Pollard's harassment was clearly erroneous, 2) that the

denial of judgment as a matter of law was improper because Pollard's claim was one of retaliation, not harassment, 3) that Pollard's harassment claim failed because she failed to show disparate treatment, 4) that judicial bias, hostility, and predetermination of facts precluded DuPont's receipt of a fair trial, and 5) that the award of attorney's fees to plaintiff was unreasonable.

Pollard cross-appeals on the bases that 1) front pay should not be subject to limitations on damages under § 198la, 2) the statutory cap on compensatory damages is unconstitutional because it violates the doctrine of separation of powers and the Equal Protection Clause, and 3) the district court erred in granting summary judgment on Pollard's claim of intentional infliction of emotional distress.

I. Facts

The district court's findings of fact are summarized as follows: Pollard began working for DuPont in 1977. In 1978 she was promoted to "assistant operator," and she was transferred to the hydrogen peroxide area of the plant in 1979. Of the approximately 28 employees in peroxide, four were women. Pollard was promoted to operator in 1987, and worked on "C" shift as one of the three operators on that shift until 1992. On each shift, operator #1 is the control room operator, and operators #2 and #3 work in other areas of peroxide manufacture, keeping the pipes, valves and other machinery operating. Each operator's duties are different and none is superior in rank to the others. While Pollard was working on "C" shift, one of the assistant operators named Rory Brico refused to take direction from plaintiff because she was a woman. He placed a Bible on her desk open to the

passage "I do not permit a woman to teach or have authority over man. She must be silent."

After that incident, plaintiff was transferred and became the #3 operator on "A" shift in 1992. The other operators on her shift were Steve Carney, the control room operator, and Jerry Lee, and the assistant operators were named Moody, Walker, and Cobb. The shift supervisor was David Swartz. During 1992 and 1993, the members of "A" shift got along without incident. In February 1994 the atmosphere abruptly changed. DuPont announced that it was going to participate in national Take Your Daughters to Work Day in April 1994, and Pollard was asked to give a talk to a group of girls coming to visit the plant. Some of the men on "A" shift, particularly Steve Carney and Jerry Lee, loudly complained about DuPont's participation in the program. A number of other men in peroxide were also against it, and they circulated an email entitled "Bull Malarky" to everyone in the plant discussing their displeasure with the program.

After plaintiff had discussions with both Steve Carney and Jerry Lee about Take Your Daughters to Work Day in early 1994, all of the men on the shift (with the exception of Mark Cobb, an assistant operator), stopped talking to plaintiff. Cobb's testimony, which was basically undisputed, indicated that Steve Carney, the control room operator, instructed all of the men on "A" shift to not eat with her, share food with her, be in the break room with her, or talk to her, and that Carney instructed the men not to follow any of Pollard's instructions without consulting with him first. Carney admitted in his testimony that "it was a possibility" that he had told the other men to disregard Pollard's directions.

It was common knowledge in the peroxide area that many of the men including Carney, Jerry Lee, and Rory Brico (of the Bible verse incident) did not approve of women working in the peroxide department. Testimony proved that Carney made remarks to this effect approximately five times per week, consistently, and that Carney routinely referred to women as "bitches," "cunts," "heifers," and "split tails." This language was commonly used by several men in peroxide, and Carney admitted that he used the terms to refer to women in general and to plaintiff in particular. In addition, DuPont had a company-sponsor support group called the Women's Network which the men vocally disapproved of Pollard attending. Plaintiff worked in this hostile environment for the next year and half.

In May 1994, after about two months of this treatment, David Swartz, the shift supervisor, held a training meeting. During a break in the meeting, Carney and Walker were having a discussion about a girl's softball team during which Carney said "that heifer can't coach" and "women have no business coaching" in reference to the woman who coached the team. Plaintiff was seated across the table, became upset, and asked to leave the meeting. She went to the nurse's station and asked the nurse to call David Swartz. When Swartz arrived, Pollard told Swartz that she could not take it anymore and that she was tired of the men always saying women couldn't do anything and degrading women. Swartz spoke with his supervisor about the incident, and they decided that Swartz should speak with the men individually about it. With the exception of Walker, none of the men on the shift remembered Swartz speaking with them about it. Carney testified that Swartz did approach him about not communicating with plaintiff immediately after the tension

started in February, but that Swartz gave up on trying to talk to him about it because, according to Carney, "he knows I'm hardheaded . . . [and there] wasn't no sense in saying anything else." In other words, Carney made it plain he was not going to change his behavior.

Swartz testified that he knew there was tension on the shift beginning in the spring of 1994 and that it did not improve for the rest of the year. He specifically testified that plaintiff complained to him about the lack of communication and isolation and other gender-based conduct on several occasions. The situation worsened in the summer of 1994. Plaintiff and Mark Cobb testified that Carney would go so far as to set off false alarms in plaintiffs area, causing her to run around the peroxide area in search of a non-existent problem. Cobb testified that Carney bragged to the other men that this was his way of showing that he, a man, was in control. If a false alarm was set while Pollard was on break cooking her dinner, the men would turn up the stove to burn her food while she was searching for the problem. In addition, Cobb testified that there were numerous incidents during which Carney would not tell plaintiff about actual alarms in her area. Plaintiff would therefore not respond to the problem, and it would appear to the operator on the next shift that she was not doing her job.

Plaintiff's job duties included monitoring the vaporizers in the peroxide tanks and determining when they should be moved. She was to sample the peroxide in a tank one hour after it was moved, and any delay would result in a weak product. Carney admitted instructing the assistant operators on several occasions to remove the vaporizers from the tanks earlier than plaintiff instructed without telling her.

Again, this made it appear to the operator on the next shift that plaintiff was not doing her job, and additionally it affected whether customers would receive their shipments on time. This happened approximately seven times in 1994 and 1995, according to Pollard, with the last incident occurring in July 1995. After the first incident she spoke to the assistant operators about it, and they informed her that they were following Carney's instructions. After the second incident, Pollard spoke with Swartz about the problem. Pollard discussed these ongoing communication problems with Swartz on numerous occasions. Swartz would tell Carney that he must call out the alarms and communicate with plaintiff, but Carney would tell Swartz that he was doing his job, and that Pollard was simply not doing her job. Swartz did not investigate further or discipline Carney. Carney was never suspended or fired for this behavior.

During the summer of 1994 plaintiff found the tires on the bicycle she rode from the gate to her section of the plant had been slashed. That day, Pollard complained to Swartz that she suspected Carney had done it. Swartz spoke with Carney, and he denied having done it. Swartz did not investigate further.

In December 1994, two of the assistant operators, Mark Cobb and David Walker, approached Swartz and asked him to call a meeting to discuss the treatment of Pollard by Carney and the other men. Swartz scheduled a meeting which they called the "first healing meeting." Carney was on vacation the day of the meeting. At the meeting, Walker and Moody told Pollard that Carney told them not to talk to her or communicate with her, and that Carney told them that Pollard was "keeping a book on them." Pollard told them that she

was not doing so, and stressed the importance of communicating with her in order for her to do her job and to avoid possible dangerous consequences. David Swartz was present and heard all of plaintiffs complaints at this meeting.

Carney returned from vacation and was angry that a meeting had been held without him. He demanded a second meeting. During that meeting, plaintiff reiterated her concerns about the lack of communication and other problems. Plaintiff also mentioned her bicycle tire slashing, and told the group of another incident in which she believed Carney tried to run her off the road as she left the plant. Carney "got in plaintiff's face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." When plaintiff asked Swartz if he was going to allow Carney to talk to her that way, Swartz said "I think that's enough" and ended the meeting. Nothing happened to change the situation.

The tension continued, and plaintiff continued to complain, both to Swartz and in her Women's Network meetings. Pollard told the group she was afraid for her safety and was concerned that a dangerous situation might arise in the peroxide area of which the men would not inform her. Beth Basham, David Swartz's supervisor, attended these meetings. She testified that she heard Pollard's complaints, and recognized that the problem in the peroxide area was due to the male workers not accepting a woman working in that area. In answer to a question on cross-examination, Basham testified that she was "of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Basham, however, never investigated Pollard's complaints further.

In the face of this record, and despite the express testimony of management officials Basham and Swartz that they knew of the sexual harassment, counsel for DuPont – both at trial and in their briefs on appeal – maintain that there was no sexual harassment and that no DuPont managers had any knowledge of harassment. At oral argument on appeal, the following testimony from Basham, the general overall supervisor of the peroxide department, was read to Ms. N. Victoria Holladay, counsel for DuPont:

> Q: And you were of the firm belief that she had been harassed on account of her sex in the peroxide area, correct?
>
> A: Yes.
>
> Q: Now, you talked about this situation with Alan Hubbell on several occasions, did you not?
>
> A: Yes.
>
> Q: And Mr. Hubbell's position in 1994-'95 was what?
>
> A: He was the area manager of hydrogen peroxide.

Joint Appendix at 412. In the face of this testimony expressly acknowledging sexual harassment and knowledge, counsel maintained that there was no such harassment and no knowledge by DuPont management.

In May 1995, a specialist in diversity training from DuPont headquarters named Bernie Scales attended the Women's Network meeting. Pollard told Scales of the problems in the peroxide area. Scales spoke to the plant manager about the problem, who subsequently spoke to Bob Shaw, employee relations manager for the plant. Shaw, Lee Ann Rice, and Gary Fish met with plaintiff on May 28, 1995 to discuss her complaints. According to Shaw and Rice, Pollard recounted fully all of her complaints at this meeting. Subsequently, Shaw and Rice spoke to Carney about his behavior. Carney never received a formal written reprimand, was never suspended, transferred, demoted, terminated, or in any other way disciplined for his behavior. There was no further investigation.

Carney's behavior improved for about a month (June 1995); he then returned to his old patterns of behavior in early July 1995. Plaintiff asked David Swartz to transfer her to another shift. Swartz offered to transfer her to the control room operator position on shift "C" with Rory Bricco, the man who had refused to take direction from her when he had been an assistant operator under her some years before, and who had initiated the Bible incident at that time. Plaintiff declined that offer. In late July 1995, Pollard discovered a highlighted copy of that same Bible verse in her locker, stating "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Upon finding the note, plaintiff requested a medical leave of absence from DuPont.

In order to investigate the bible verse incident, DuPont formed a list of identical questions, answerable by a simple

yes or no. When each employee denied having knowledge of the incident, no further questions were asked and the investigation was stopped. Carney himself was never questioned about his knowledge of who had placed the verse in Pollard's locker because he was on vacation at the time it occurred.

After Pollard left "A" shift, the entire shift, including supervisor David Swartz, held a party. They taped balloons to the ceiling and had a fish fry. The purpose of the party was to celebrate Pollard's departure, as Carney admitted in his testimony. Carney said at the party, "Glad the bitch is gone, glad the bitch is not coming back." David Swartz told Carney to shut up, that he did not need to hear Carney saying those things in case of future investigations concerning Pollard.

Plaintiff was on short-term disability leave for six months based in part on the advice of DuPont's psychologist. DuPont scheduled a "return to work" meeting in February of 1996 in spite of the psychologist's advice to the contrary, at which time DuPont told Pollard that they could not guarantee that she would not be put back on a shift with Steve Carney and the other members of "A" shift. When plaintiff declined to return to work under those conditions, DuPont fired her.

II. Hostile Work Environment Sexual Harassment

After reviewing the Supreme Court's decision in *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), we recently concluded that a plaintiff seeking to establish a company's liability for acts of her co-workers must show that the employer "knew or should have known of the charged

sexual harassment and failed unreasonably to take prompt and appropriate corrective action." *Fenton v. HiSan, Inc.*, 174 F.3d 827, 830 (6th Cir. 1999).

Defendant DuPont challenges the district court's determination that plaintiff was harassed on the basis of her sex because the conduct, according to DuPont, was gender-neutral and non-sexual in nature. In order to prove that forms of conduct not inviting sexual relations constituted sexual harassment, plaintiff "'must show that but for the fact of her sex, she would not have been the object of harassment.'" *Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

As the district court found, there was overwhelming testimony as to the anti-female animus which the men in peroxide consistently demonstrated, specifically toward women working in the peroxide area (as opposed to women filling traditionally "female" jobs, such as secretaries and office workers in other areas of the DuPont compound). We have recited these facts in detail above.

Plaintiff must prove that, after considering the totality of the circumstances and the context in which certain treatment of plaintiff occurred, the harassment which she sustained was sufficiently pervasive and severe as to alter the conditions of her employment and create an abusive working environment. Each alleged act of harassment must not be viewed in a vacuum, but must be considered together with the other acts. Characteristics such as their frequency, intensity, and whether they "merely" created psychological trauma or

whether they actually interfered with a plaintiffs work are all factors to be considered.

In the recent *Williams* decision, we determined that the following behavior was severe and pervasive enough to constitute harassment: co-workers who used foul language, such as "fuck" and "slut"; sexual innuendos concerning the plaintiffs breasts or sexual prowess; tasteless sexually-based jokes and puns directed toward plaintiff; co-workers conspiring against her in order to force her onto another shift; objects glued to the top of her desk; being told "I'm sick and tired of these fucking women" and having a box thrown at her simultaneously; being denied overtime and breaks; and other "pranks," such as being locked in a room, or finding materials blocking her way into or out of an area of the plant. *See Williams*, 187 F.3d at 559. This behavior seems clearly to encompass many types of sexual harassment: actual sexual propositioning, offensive language or behavior about women in general and women in the workplace, and non-sexual actions directed toward a plaintiff in order to interfere with her work. Plaintiff here proved daily sexually degrading comments about women which often occurred outside of her hearing; a co-worker who instructed the men working as her assistants not to take direction from plaintiff or talk to her at any time because of her gender; several incidents of plaintiff not being informed of facts concerning her job which would result in an appearance of incompetence on her part, and which could be potentially physically dangerous to her and to other members of the plant; isolated incidents occurring within her hearing of women being called "heifers" and being degraded for their inability to accomplish tasks as well as men; being subjected to false alarms and practical jokes, such as her dinner being burned, with the alleged intent of driving

plaintiff away from her shift; and the Bible verse concerning women's proper submissive role being placed in her locker. This conduct constitutes severe and pervasive harassment, just as severe and pervasive as in *Williams* and our other co-worker sexual harassment precedent.

Next, we address the issue of whether or not DuPont received actual or constructive notice of Pollard's complaints and responded reasonably. DuPont challenges the court's factual findings, arguing that the findings concerning DuPont's lack of responsiveness towards Pollard's numerous complaints were clearly erroneous. Specifically, as pointed out above, DuPont continues to argue that the testimony at trial failed to establish that DuPont was ever made aware that any sex-based derogatory comments were addressed to Pollard. This argument assumes that only sex-based derogatory language is actionable under Title VII, and fails to consider the testimony related to a lack of work-related communication, sabotage of plaintiffs work, and personal isolation and harassment, all of which was based on the belief that women should not work in the peroxide area.

After reviewing the trial testimony in this case, we believe that the trial court's findings of fact were correct. The testimony at trial indicated that plaintiff told her direct supervisor, David Swartz, of the incidents of harassment on numerous occasions. David Swartz, in particular, was independently aware of the language, isolation, and communication problems on "A" shift through his own observations of the shift, even absent plaintiffs complaints to him. In addition, Beth Basham, David Swartz's supervisor, testified that although she believed, based on Pollard's complaints during Women's Network meetings, that Sharon

Pollard was being harassed by her coworkers because they could not accept a woman working in the peroxide area, she never initiated any further investigation concerning the allegations. After the most blatant episode, when Pollard found the Bible verse in her locker, DuPont management interviewed the members of "A" shift with a list of yes-or-no questions, and when they responded "no" to the question concerning knowledge about the event, the interviews were concluded. The lack of an admission under such circumstances is not surprising. No member of the peroxide area was ever formally reprimanded, suspended, or transferred to another shift due to any of their actions. Finally, Bob Shaw confirmed in his testimony that Sharon Pollard was told that if she returned to work, she would be put back on the same shift with Steve Carney and the other members of "A" shift, although a woman would be added to the shift.

This testimony is countered by DuPont's arguments 1) that the men were instructed not to behave inappropriately and to continue to communicate with Pollard as to work-related matters once DuPont became aware of Pollard's work isolation; 2) that DuPont posted notices explaining what constituted inappropriate conduct after learning of the July 1995 Bible verse incident and explained that conduct of that nature would result in termination; 3) that a good-faith investigation, even if ineffective, should shield DuPont from liability; and 4) that her complaints to her direct supervisor, David Swartz, as well as the complaints made in the context of Women's Network meetings, were not actually complaints to management about harassing conduct, and therefore did not put DuPont on actual notice of her problems. These arguments are not persuasive. Not only was it reasonable for

the district court to conclude that members of DuPont management were actually aware of Pollard's harassment complaints, the district court was justified in finding that DuPont's reaction to Pollard's complaints did not constitute a "good faith" effort to remedy the situation. As noted above, this trial produced substantial evidence that several members of DuPont management were aware of Pollard's situation, both through her complaints and through first-hand experience, but they allowed the situation to fester without definitive action on the part of management. Steve Carney's behavior toward Pollard was well known. No disciplinary action was taken against him.

We next address DuPont's argument that Pollard's claim was one of retaliation, not sexual harassment, and thus that the decision holding that sexual harassment existed must be reversed. This is a red herring argument. There is nothing in Pollard's testimony, her complaints to DuPont, or her complaint initiating this action which indicates that DuPont took adverse action against her for complaining of the treatment she was receiving on "A" shift. The complaints indicate quite clearly that Pollard's problem was with her treatment by the other members of her shift and DuPont's inaction with respect to that problem, not any further action which DuPont took against her.

Finally, we turn to DuPont's claim that plaintiff cannot prevail on her claim of hostile work environment sexual harassment because she did not prove disparate treatment. Disparate treatment sexual harassment (assuming that by "disparate treatment" DuPont means harassment subject to the McDonnell Douglas test) is inherently different from hostile work environment sexual harassment. The federal courts treat

the two types of cases differently for good reason. The McDonnell Douglas framework is meant to prove that conduct which might have some otherwise legitimate motive (such as promoting a man instead of a woman) was in fact based upon discriminatory motive. When a plaintiff proves that a hostile work environment existed, there is no legitimate justification for such an environment, and thus recourse to the McDonnell Douglas test is not warranted. A defendant's only option is to deny the charges or argue that defendant effectively remedied the situation, not to submit that the hostile environment was in some way warranted. Additionally, as the Supreme Court recognized in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63-68 (1986), the proof of a hostile work environment is in fact part of "'the entire spectrum of disparate treatment of men and women'" in the workplace, which is in no way limited to actions which economically impact a plaintiff, such as decisions to hire, promote, or fire an employee. *Id.* at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707 (1978)). In other words, the Supreme Court has long recognized that proof of hostile work environment sexual harassment is proof of disparate treatment. For these reasons, it is one of the most basic tenets of employment discrimination law that it is not necessary to prove economic disparate treatment in order to make out a prima facie case of coworker hostile environment sexual harassment. The defendant's argument to the contrary is based upon a fundamental misunderstanding of the law.

For the foregoing reasons, we AFFIRM the district court's opinion finding DuPont liable for the co-worker sexual harassment of its employees.

III. Judicial Bias

DuPont also claims that the trial judge was so biased in his approach to this trial that DuPont was denied the fundamental right to a fair trial. During the testimony of Bob Shaw, the final defense witness and the highest-ranking member of DuPont management who testified, Judge McCalla expressed his opinions with regard to this case. He angrily challenged Shaw and questioned him for a period of time, using language that was hostile and evidenced his desire to inform Shaw of the ways in which he believed DuPont had erred in their behavior towards Pollard. The court's comments seem to indicate three things: First, that after hearing all of the testimony (with only the remainder of Shaw's testimony to be heard), the court was quite convinced that the witnesses for the plaintiff were trustworthy and the key witnesses for the defense (the other members of "A" shift, including Steve Carney) were lying. Second, the court had also concluded that DuPont's actions in attempting to remedy the harassment were entirely unsatisfactory. And, finally, the court wanted Bob Shaw to hear his comments on the way DuPont handled this case so that DuPont could learn from its mistakes in this case and proceed differently in the future.

The standard of behavior expected of a judge is different when the case is tried to the bench rather than before a jury. The Supreme Court has recently concluded in language applicable to the conduct in this case:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been

> shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

Liteky v. United States, 510 U.S. 540, 550 (1994) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2nd Cir. 1943)).

There is no indication in the case at hand that the district court was in any way personally biased for the plaintiff before the trial began, nor is there evidence that DuPont was treated unfairly during the course of the trial. The remarks were made just prior to the conclusion of the defense case, after the district court had heard the vast majority of the evidence before it. In the absence of any evidence that the district court was unfair in his dealings with the defense during the course of the trial, it is difficult for us to conclude that the judge was unfairly biased. In addition, since there was no jury which could have been improperly influenced by the comments, there is no compelling reason to subject this case to a retrial. We believe the court's comments stemmed from the conclusions which the judge had rightly formed as part of his factfinding duty, although the

comments were spoken in anger and moral outrage in response to the injustice and harm DuPont and some of its employees visited upon plaintiff. It is difficult to read the record in this case without sympathy for the plaintiff who endured, without relief, the cruelty of Steve Carney and other male co-workers at DuPont. We therefore DENY defendant's motion for a new trial.

IV. Attorney's Fees

DuPont challenges the district court's decision to award plaintiff attorney's fees. Attorney's fee awards are reviewed for an abuse of discretion. *See Hensley v. Eckerhart,* 461 U.S. 424 (1983). Attorney's fees are generally awarded for a reasonable number of hours expended multiplied by a reasonable fee, and are generally reduced in an amount reflective of the amount of time spent pursuing claims which were ultimately unsuccessful. DuPont argues that the award of attorney's fees ($252,997.38) should have been reduced due to the district court's summary judgment for the defense on the issues of intentional infliction of emotional distress, negligent supervision, and loss of consortium. DuPont also argues that the attorney's fees are excessively high. Plaintiff argues only that the fees were "reasonable." Neither party gives any explanation, either with or without mathematical calculations, as to why the fees were "reasonable" or "unreasonable." Without a more specific claim that the attorney's fees were unreasonable, it is difficult to conclude that the award constituted an abuse of discretion. This was a hard-fought case which has gone on for four years. We are offered no basis for setting aside the fees, and therefore AFFIRM the district court's award of attorney's fees.

V. Statutory Limitation of Front Pay

Pollard cross-appeals on the basis that front pay should not be subject to the limitations on "compensatory damages" under 42 U.S.C. § 1981a. The district court noted that it was bound by this Circuit's decision in *Hudson v. Reno,* 130 F.3d 1193 (6th Cir. 1997), which held that front pay was subject to the $300,000 statutory cap because front pay was an element of future pecuniary losses. Pollard now argues that front pay is not an element of future pecuniary losses, but is instead a replacement for the remedy of reinstatement in situations where reinstatement would be inappropriate. The Equal Employment Opportunity Commission, in an amicus brief, agrees with Pollard that the *Hudson* case was wrongly decided.

First, the argument is made that § 1981a, by its very terms, explicitly excludes remedies which were traditionally available under Title VII from the statutory cap, and notes that front pay was a traditionally available remedy. Second, the argument is made that the legislative history of the statutory cap on compensatory damages clearly indicates that front pay was not intended to be included in it. Third, plaintiff claims that the *Hudson* decision misinterpreted existing Sixth Circuit cases examining the nature of front pay as a remedy. And finally, Pollard and the EEOC argue that public policy concerns weigh in favor of excluding front pay from the $300,000 statutory cap on compensatory damages and that other Circuits have reached a conclusion contrary to *Hudson. See Martini v. Federal Nat'l Mortgage Ass'n,* 178 F.3d 1336, 1348-49 (D.C. Cir. 1999); *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 556 (10th Cir. 1999); *Kramer v. Logan County Sch. Dist. No. R-I,* 157 F.3d 620, 625-26 (8th

Cir. 1998). *See also Rivera v. Baccarat, Inc.*, 34 F. Supp.2d 870, 878 (S.D.N.Y. 1999); *Bizelli v. Parker Amchem*, 17 F. Supp.2d 949, 954 n.2 (E.D. Mo. 1998).

We agree with these arguments, but our hands are tied. One panel of this court may not overturn the decision of another panel of this court - that may only be accomplished through an en banc consideration of the argument. Plaintiff does not purport to distinguish *Hudson*. Therefore, we must decline to overturn the district court's decision that front pay is included in the compensatory damages statutory cap found at 42 U.S.C. § 1981a.

VI. Constitutionality of the Statutory Cap on Damages

Plaintiff cross-appeals on the basis that the statutory cap on compensatory damages found at 42 U.S.C. § 1981a is an unconstitutional violation of the Separation of Powers doctrine. Pollard argues that by creating the statutory cap, Congress impermissibly encroached upon the judiciary and its "traditional responsibility" for assuring against excessive verdicts on a case-by-case basis. We do not find this argument persuasive. Congress created Title VII, and Congress may designate the remedies under Title VII. *See Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion) (holding that where Congress creates a statutory right, "it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies.") The fact that the judicial branch is limited in the amount of damages which it may award does not mean that its ability to decide cases is being impaired by Congress.

Pollard also argues that the statutory damages provision violates the Equal Protection Clause of the Fourteenth Amendment in that it unfairly discriminates among those persons who wish to vindicate their rights with respect to racial discrimination and those who wish to vindicate their rights with respect to gender discrimination. Since the statute at issue is a federal one, we assume that plaintiff meant to invoke the implied equal protection clause inherent in the Due Process Clause of the Fifth Amendment, which is applicable to the federal government. The parties agree that the statute must stand if it bears a rational relationship to any legitimate articulated government purpose.

42 U.S.C. § 1981a places a $300,000 statutory cap on all intentional discrimination on the basis of race, national origin, sex, religion, or disability (as defined in the Americans with Disabilities Act). The statute is inherently equitable on its face. The difference in the application of this statute in situations of gender or race discrimination occurs due to a provision in the Act which states that nothing in section 1981a is to be construed as in any way limiting the remedies provided in section 1981 itself, which does not limit recovery for intentional discrimination based upon race or national origin. However, section 1981 provides relief for a different type of claim than encompassed by the remedies available to plaintiff in section 1981a. Section 1981 provides for relief from discrimination in the making and enforcing of contracts, while section 1981a provides for relief purely from intentional discrimination in the employment context. While section 1981 includes contracts for employment, it also includes contracts for admission to organizations, insurance and other business contracts with private persons or corporations, and admission to schools. Plaintiff cannot

therefore be said to be "similarly situated" with section 1981 claimants.

Even if plaintiff is similarly situated with a section 1981 claimant due to the fact that employment discrimination is covered under both acts, her claim still fails. Discrimination on the basis of race and national origin is indisputably the cornerstone of our entire body of civil rights law. In a political compromise, the Civil Rights Act of 1991 was limited in the remedies which it would provide due to a belief that unlimited damages for all forms of discrimination would force employers to institute hiring quotas for their own economic safety. *See* 137 Cong. Rec. S15472-01 (discussing the fear of quotas that drove the compromise which was reached in the Civil Rights Act of 1991). The adoption of the provision saving the remedies available under section 1981 was rationally related to the legitimate purpose of creating reasonable damages available to all other victims of intentional discrimination without being forced to limit the damages already available to victims of racial and ethnic discrimination.

For the foregoing reasons, we AFFIRM the opinion of the district court limiting plaintiffs award pursuant to 42 U.S.C. § 1981a.

VII. Summary Judgment for the Defense on the Common Law Claims

Finally, plaintiff cross-appeals the district court's decision to grant summary judgment for the defense on plaintiffs claim of intentional infliction of emotional distress. The conduct alleged by a plaintiff must satisfy an extremely

high burden in order to survive a motion for summary judgment with respect to a claim of intentional infliction of emotional distress in Tennessee. The district court in this case correctly quoted the appropriate language from *Dunn v. Moto Photo, Inc.*, 828 S.W.2d 747, 751 (Tenn. Ct. App. 1991), saying that the conduct must be that which would be deemed utterly intolerable in a civilized society. That case makes it clear that criminal, tortious, intentional, or malicious conduct does not automatically satisfy the standard. We believe, however, that the intentional and malicious conduct found by the district court in this case is unusually egregious and raises a factual issue with respect to the outrageousness of the behavior involved. The sort of daily, consistent harassing behavior which Pollard endured over a period of months and years has been characterized as a type of slow torture. Her work was sabotaged, her personal safety was compromised, she was subjected to juvenile pranks intended to force her to resign from the shift, and she was repeatedly informed of her co-workers' belief in the inferiority of women. We found ourselves, after reviewing the record, proclaiming a sense of moral outrage that DuPont managers allowed the conduct of the men in the peroxide area to persist for years in silence, and therefore silent approval. Inaction by an employer, or another actor in a position to exercise control, in the face of continuous, deliberate, degrading treatment of another may rise to the level of intentional infliction of emotional distress. The tort would be unnecessary in our law as a deterrent if assault or physical harm were always made a necessary element.

We conclude that material issues of fact are presented by the outrageous nature of the conduct of DuPont employees together with the refusal of its managers to correct the

situation and its blanket, continuing official denial in the face of contrary facts that discrimination based on gender occurred or that its managers were aware of the discrimination. A fact finder at the trial level will hear the case on remand and decide whether the plaintiff has met the standard enunciated by the Tennessee courts for the tort of intentional infliction of emotional distress. We therefore REVERSE the district court's decision to grant summary judgment to DuPont on this issue and REMAND for trial. Otherwise we AFFIRM the judgment of the district court. Plaintiffs motion to strike Pollard's reply brief is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Filed August 20, 1998]

No. 95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Sharon Pollard, brought this suit against her former employer, alleging that she had been subjected to a hostile work environment because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). A non-jury trial was held in this matter on October 14, 15, 16, and 24, and November 3 and 4 of 1997. For the reasons set forth below, the Court finds that plaintiff was subjected to a hostile work environment because of her gender, in violation of Title VII, and judgment is ENTERED in favor of plaintiff.

FINDINGS OF FACT

Plaintiff began her employment with defendant in 1977 as a utility worker in the utility pool. She was promoted to the position of assistant operator ("AO") in the oxone flouride area in 1978, and transferred to an AO position in the hydrogen peroxide area in 1979. In 1987, plaintiff was promoted to the position of operator in the hydrogen peroxide area. While plaintiff was working as an operator in peroxide, only one other woman was in an operator position in that area, and only two of the assistant operators were female. All of the other operators and assistant operators in the peroxide area were male.[1]

Plaintiff initially worked as an operator on "C" shift from 1987 to 1992. Each shift has three operators: the control room operator (or operator #1), operator #2, and operator #3. Each operator has separate duties on the shift, and none of the operators is superior in rank to the others. The control room operator works in the control room, the #2 operator works the south side of the area, and the #3 operator works in the laboratory and in the water building. The three AOs that are assigned to each shift take direction from the operators. While plaintiff was working as the control room operator on "C" shift, an incident occurred during which an

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[1] Based on testimony at trial, the Court concludes that there are four different shifts ("A", "B", "C", and "D"), with approximately seven people on each shift. See Testimony of Mark Cobb ("Cobb's Test."), Trial Transcript ("Tr.") at 240. Accordingly, of the approximately twenty-eight employees on shifts in the peroxide area, only four were women.

AO, Rory Bricco, refused to take direction from plaintiff. Mr. Bricco informed plaintiff that he could not take direction from a woman, and placed a Bible on her desk, opened to a passage which read, "I do not permit a woman to teach or have authority over a man. She must be silent."[2] Plaintiff subsequently transferred to a #2 operator position on "A" shift in 1992.

In 1994, plaintiff had moved from the #2 operator position to the #3 operator position on "A" shift in the peroxide area. The other members of her shift were Steve Carney, Jerry Lee, Joey Moody, David Walker, and Mark Cobb. Carney was the control room operator, Lee was the #2 operator, and Cobb, Moody, and Walker were the three AOs on the shift. The shift supervisor at that time was David Swartz.

During 1992 and 1993, plaintiff and all of the other members of "A" shift got along well. Many of the witnesses testified that they viewed the shift as their "extended family." Members of the shift would cook and eat their meals together

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[2] The Court notes that this event occurred outside of the relevant time period in this case, which is from December 1994 to December 1995, and thus cannot form a basis for liability on the part of defendant. Because allegations involving this same Bible verse are properly before the Court, however, this event is included as context, as the Court finds that the fact that plaintiff had been previously exposed to this Bible verse while working in the peroxide area contributed to the intensity of her reaction when she saw it for the second time.

in the break room,[3] and would talk to each other regularly about their lives outside of work.

In February of 1994, however, the congenial atmosphere on "A" shift began to change. At that time, DuPont announced that it would be taking part, for the first time, in the nationally recognized "Take Your Daughters to Work Day" ("TYDTWD") in April of that year. Plaintiff, as one of two female operators in the entire peroxide area, was asked to give a talk about her job to some of the girls coming to visit the plant on that day, and she agreed to do so. A number of the men on "A" shift, particularly Steve Carney and Jerry Lee, were against TYDTWD, and made their displeasure with DuPont's decision to take part in this event widely known. A number of other men in peroxide, and throughout the plant, were against DuPont's participation as well. See Testimony of Jerry Lee ("Lee's Test."), Tr. at 495. One of these men, Paul Lucas, sent an email out to everyone in the plant regarding TYDTWD, referring to the event as "horse malarky."

Plaintiff had discussions with both Steve Carney and Jerry Lee regarding her participation in TYDTWD, and both

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[3] There were three separate eight hour shifts in the peroxide area: the 8:00 a.m. to 4:00 p.m. shift, the 4:00 p.m. to 12:00 midnight shift, and the 12:00 midnight to 8:00 a.m. shift. The employee break room included a small kitchen area with a stove, refrigerator, and microwave, and, particularly on the evening and midnight shifts, members of "A" shift would divide up cooking duties and take turns bringing in food to allow them to eat together.

men made clear that they were against it. Testimony of Sharon Pollard ("Pollard's Test."), Tr. at 627-28. Subsequent to those discussions, the atmosphere on the shift began to change. All of the men on the shift, with the exception of Mark Cobb, stopped eating with plaintiff and stopped talking to her. Cobb testified that Carney instructed the other men on the shift not to eat with plaintiff, not to share food with her, not to be in the break room with her, and not to talk to her. Cobb's Test. at 251, 273. Plaintiff testified as follows:

> [I]f I came into the lunchroom, nobody would sit down at the table with me. If I sat down at a table that someone was already sitting at, they would get up and leave. . . . I heard a lot of under your breath kind of things . . . and snickering.

Pollard's Test., Tr. at 37. Cobb further stated that Carney instructed the other men on "A" shift not to follow any of plaintiff's instructions without checking with him first. Cobb's Test. at 251-52. Carney himself conceded that "[i]t's a possibility" that he told AOs on "A" shift to disregard plaintiff's instructions. Id. at 904.

It was common knowledge among the employees in the peroxide area that Steve Carney, Jerry Lee, Rory Bricco, and many of the other men in the area, did not approve of women working in peroxide. Cobb's Test., Tr. at 246-47, 251, 359, 361; Testimony of David Walker ("Walker's Test."), Tr. at 746-47. Mark Cobb testified that Carney would make comments to this effect approximately five times per week to the men on "A" shift, and Cobb and several other witnesses

confirmed that Carney routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52.

Several witnesses testified that they had heard Carney use the word "heifer" to refer to women, and that use of the term "heifer" to refer to women in general was commonplace in the peroxide area. Testimony of Joey Moody ("Moody's Test."), Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723. Carney admitted that he referred to women as "heifers," and that he referred to plaintiff as a "bitch" and a "split tail." Testimony of Steve Carney ("Carney's Test."), Tr. at 908-09. In addition, DuPont had a company-sponsored support group known as the Women's Network,[4] of which Carney routinely expressed his disapproval. Cobb's Test., Tr. at 246-47; see also Testimony of Kay Jenks ("Jenks' Test."), Tr. at 416 (noting that the men on plaintiff's shift did not approve of plaintiff attending the meetings of the Women's Network).

In May of 1994, after plaintiff had been experiencing the kind of isolation described above from the members of "A" shift for approximately two months, the shift supervisor, David Swartz, held a training meeting.[5] During the meeting, all of the members of "A" shift and Swartz were seated around a small conference table. At some point during a

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[4] Plaintiff regularly attended meetings of the Women's Network.

[5] This training meeting was not held to address the problems on the shift, rather it was a training session on work-related matters that was regularly held on Tuesdays.

break in the meeting, Carney and Walker were having a discussion about a girls softball team, during which Carney said "that heifer can't coach," in reference to the woman who coached the team. Moody's Test., Tr. at 697. Carney also said something along the lines of "women have no business coaching." Moody's Test., Tr. at 677-78; Walker's Test., Tr. at 753; Lee's Test., Tr. at 472-73; Pollard's Test., Tr, at 632. Plaintiff, who was sitting across the table from Carney, heard these comments, became very upset, and asked to be excused to go to the nurse's station. Pollard's Test., Tr. at 632-34.

Once she arrived at the nurse's station, plaintiff asked the nurse to call her supervisor, David Swartz, to come and speak with her. When Swartz arrived, plaintiff was very upset and began to cry. Swartz testified that she told him "that she couldn't take it any more, she was tired of people talking about women the way they do . . . [that Steve Carney had said] 'Well, that heifer can't coach,' . . . and she was just tired of them saying that women can't do anything." Testimony of David Swartz ("Swartz's Test."), Tr. at 949-50. Swartz further testified that he understood plaintiff's words to mean that "she couldn't take it any more about [the] men [in peroxide] degrading women." Id. at 979-80.

Swartz testified that he spoke with his supervisor, Alan Hubbell, about this incident, and that they decided that Swartz should speak to the men on the shift individually. Swartz's Test., Tr. at 952. With the exception of Walker, however, none of the men on the shift remembered Swartz speaking to them about this incident. Carney testified that Swartz spoke to him "a few times" about not communicating with plaintiff "right after [they] quit talking," but that Swartz soon gave up

on trying to talk to him about it "because he knows I'm hardheaded . . . [and there] wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84.

Swartz testified that he could tell "there was tension on the shift" beginning in the spring of 1994, and that things did not improve during the rest of the year. Swartz's Test., Tr. at 954-55. He testified that many of the men talked to him about the tension on the shift, and that plaintiff complained to him about the lack of communication and isolation on several occasions. Id. at 954, 956. When asked by counsel for DuPont what he, as the shift supervisor, tried to do to address the situation between spring of 1994 and December of 1994, Swartz responded:

> Well, I mean we continually talked to each individual. . . . I worked personally talking to each one of them hopefully [sic] that we could get back together, you know, as a more friendly group where it would relieve the tension, but it didn't seem to work.

Id. at 955.

During the spring and summer of 1994, plaintiff's situation worsened. The men on the shift still refused to eat with her or speak with her. She testified, and Mark Cobb corroborated, that on several occasions Carney would set off false alarms in her area, causing her to run around the

peroxide area in search of a non-existent problem.[6] Pollard's Test., Tr. at 38; Cobb's Test., Tr. at 266-69. Cobb testified that Carney would brag to the other men on "A" shift about making plaintiff run all over plant to "show [] that he's in control." Cobb's Test., Tr. at 269. Cobb further testified that on two separate occasions after a false alarm had been pulled while plaintiff was cooking her dinner, one of the men would turn up the stove under her food, burning her dinner and rendering it inedible. Id. at 270-71. Cobb also stated that on several occasions, Carney would not call out actual alarms from plaintiff's area.[7] Id. at 275. As a result, plaintiff would not respond to the problem, and it would appear to the #3 operator on the next shift that she was not doing her job. Id. at 275.

Part of plaintiff's job as the #3 operator was to monitor the vaporizers in the peroxide tanks, determine when they should be moved, and instruct the AOs to move them according to this schedule. Pollard's Test., Tr. at 32-33; Moody's Test., Tr. at 687. Plaintiff testified that, on several occasions, Carney told one of the AOs on "A" shift to remove

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[6] Several witnesses testified that the peroxide area was the size of three city blocks.

[7] Based on the testimony during the trial, it appears that the control room operator sits in the control room of the peroxide area and monitors a series of instrument panels. If there is a problem, the control room operator will become aware of it via these instruments. The control room operator is then supposed to call out an alarm over the intercom system to the operator or AO working in the relevant area, so that the appropriate individual can go check on the problem.

the vaporizer from the tank earlier than plaintiff had planned for it to be removed, and then instructed them not to tell her that they had done so. Pollard's Test., Tr. at 32-33, 35. Plaintiff needed to sample the peroxide one hour after the vaporizer was removed. Id. at 90; Moody's Test. at 710. Accordingly, if the vaporizer was removed early, and plaintiff was not informed that it was removed, the resulting product could be too weak.[8] The fact that the peroxide was not timely sampled also created more work for the #3 operator on the next shift, and made it appear that plaintiff was not doing her job. Id. at 94-95. In addition, removing the vaporizer early could mean that not enough peroxide was made for the shipment out to DuPont's customers the next day, again making it appear as if plaintiff was not competently executing her job duties. Id. 89-90.

Plaintiff testified that the vaporizers were removed early approximately seven times during 1994 and 1995, with the most recent incident occurring during the week of July 5-11, 1995. After the first time that the problems with the vaporizers occurred, plaintiff spoke with David Walker and Joey Moody about it and asked them not to do it again. Id. at 98. Moody told her that he was following Carney's instructions. Id. Carney himself testified that he would sometimes tell one of the AOs to move a vaporizer, and that

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[8] Various percentage strengths of peroxide were made at DuPont. Plaintiff testified that if a tank was off even 2%, e.g., a tank that was supposed to be 70% strength was 68% instead, it could not be brought back up to the proper percentage because the volume of chemicals that would have to be added would not fit into the already full tank. Pollard's Test., Tr. at 102-03.

when he did so he did not believe that he had an obligation to tell plaintiff. Carney's Test., Tr. at 895.

Plaintiff testified that she spoke to her supervisor, David Swartz, about the vaporizer problem the second time it occurred, and every time after that. Swartz admitted that he spoke with plaintiff on several occasions during the spring and summer of 1994, and that she complained to him that "she wasn't getting communication – that Steve wasn't calling out alarms or he wouldn't say stuff to her when [vaporizers] were pulled or whatever because she had responsibility [for] sampling those tanks." Swartz's Test., Tr. at 957. Swartz testified that his only response to these complaints was the following:

> I [Swartz] would go to Steve and say "Steve, that's part of your job, you got to call out alarms." His response was, "I'm calling out the alarms, she's not answering it." So I was hearing it from both sides. And I would tell Sharon, "Steve's saying you're not responding to it." And she would say that she was, and so we had to get that communication link straightened out, and I thought that eventually that worked out. . . .

Id. 957. The evidence in the record, however, demonstrates that the problem was not solved, and that Swartz never investigated plaintiff's complaints further.

During the summer of 1994, plaintiff came to work one day and found that both of the tires on her bicycle had

been slit open.[9] Swartz admitted that the day that plaintiff discovered that the tires had been cut, she reported it to him and told him that she suspected that Carney was responsible. Swartz's Test., Tr. at 959. In response to this complaint, Swartz spoke with Carney, and Carney denied cutting plaintiff's tires. Id. Again, after Carney denied the allegations, Swartz did nothing else to investigate plaintiff's complaints. Swartz stated, "I didn't have any other facts to go on that would say that he did it." Id. 959-60. Accordingly, rather than investigate further, Swartz did nothing.

In December of 1994, after these problems had been occurring for ten months with no improvement, Mark Cobb and David Walker approached David Swartz and asked him to call a meeting with the entire shift to discuss the situation.[10] Accordingly, a meeting was held in late December of 1994 that came to be known as the "first healing meeting." On the date that the meeting was to be held, Carney was on vacation. The members of the shift discussed whether or not they should proceed with the meeting without him, and decided to go ahead.

At this meeting, Walker and Moody told plaintiff that Carney had encouraged them not to talk to her. Pollard's Test., Tr. at 46. Walker and Moody also told plaintiff that

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[9] Because the DuPont plant is so large, employees often ride bicycles from the front gate to their area.

[10] The Court notes that even after all of the complaints that Swartz had received during the past ten months from plaintiff, the idea to call a meeting to discuss the situation was not his.

Carney had told them that she was "keeping a book on them" in which she wrote down everything they said to use it against them. Id. Plaintiff assured them that she was not keeping a book, and then explained to them how stressful the isolation was for her, and how she "had to run around and do more steps than [she] would normally do to get [her] job done . . . because [she] wasn't getting communicated with." Id. at 47. Plaintiff also explained to them that the lack of communication was dangerous because a spill or explosion could result, and that it could also cause a shipment to a customer to be missed. Id. at 51. David Swartz was present throughout this meeting and, again, heard all of plaintiff's complaints.

When Carney returned from vacation and learned that "A" shift had held a meeting without him he was furious, and demanded that another meeting be held. Pollard's Test., Tr. at 51; Cobb's Test., Tr. 285-86; Moody's Test., Tr. at 684; Swartz's Test., Tr. at 961. During the second meeting, the entire shift, including Swartz, was present. Plaintiff reiterated all of her concerns about the lack of communication and other problems. Plaintiff also mentioned that her bike tires had been slashed, and another incident that summer in which she believed that Carney had tried to run her off the road in his truck as she left the DuPont plant.[11] Moody's Test., Tr. at 685; Walker's Test., Tr. at 738. At the second meeting, Carney "got in [plaintiff's] face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault."

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[11] Swartz concedes that he never did anything to investigate plaintiff's allegation that Carney tried to run her off the road. Swartz's Test., Tr. at 1004.

Pollard's Test., Tr. at 52; Moody's Test., Tr. at 684-85; Cobb's Test., Tr. at 289-90. Plaintiff then turned to Swartz, who was observing this interaction, and asked him if he was going to permit Carney to speak to her in that manner. Cobb's Test., Tr. at 290-91; Pollard's Test., Tr. at 52; Swartz's Test., Tr. at 993. Swartz then said "I think that's enough," and the meeting ended with no further resolution of the issues. Id.

Subsequent to these meetings, the situation did not improve. Swartz was aware that the hostility and tension on the shift had not abated, and plaintiff continued to complain to him that the environment was intolerable for her. Swartz's Test. at 964. Swartz, however, took no action to help her. During this time period, plaintiff attended several meetings of the Women's Network and spoke to the group about the problems she was facing, the isolation she was experiencing, and the psychological effect it was having on her. Jenks' Test., Tr. at 415-17. Kay Jenks, a female engineer and one of the leaders of the Woman's Network, testified that during the Network meetings plaintiff:

> was concerned that she would be out there on nights, frequently the only woman on shift, she would go for hours without even hearing another voice. . . . She was concerned that something would happen that would endanger her and they would not tell her, they would not get ahold of her, she was also concerned that maybe something would go wrong in the process that she could help fix or impact, but they wouldn't let her know in time and then it would reflect poorly on her performance.

Id. at 417.

In attendance at some of these meetings was Beth Basham, unit supervisor for the peroxide area.[12] Basham conceded that she heard plaintiff talk about the problems she was having with the men in peroxide on several occasions. Basham's Test., Tr. at 1184, 1194-95. Basham further testified that she "knew there was a real problem in the peroxide area of the male workers accepting the role of a female in that area," and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Id. at 1195, 1217. In spite of this knowledge, however, Basham never investigated the situation based on what she had learned at the Women's Network meetings.[13] Basham testified that she never wrote a report or sent a memorandum to anyone in upper management at DuPont stating that there was a real problem in the peroxide area regarding the treatment of female employees, and she "could not recall" if she ever discussed the situation with anyone at DuPont's headquarters informally. Id. at 1197-98.

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[12] Basham was the supervisor of Alan Hubbell, who was David Swartz's supervisor. Basham was the "number one person in the peroxide area," and reported directly to the plant manager, Gary Lewis. Testimony of Beth Basham ("Basham's Test."), Tr. at 1181-82.

[13] Basham did become involved in the investigation that took place during the summer of 1995, but, prior to that, did nothing to formally investigate plaintiff's charges of harassment, despite learning of them in the context of the Women's Network meetings.

On May 25, 1995, the Women's Network hosted a meeting at which Bernie Scales, a specialist in diversity training from DuPont's headquarters, spoke to the Network. At that meeting, plaintiff began to talk about the isolation and harassment she was receiving from the men in peroxide, and asked to speak to Scales further at the conclusion of the meeting. After the meeting was over, Scales met with plaintiff. At that meeting plaintiff told Scales all about the long-term harassment and isolation she had been experiencing. As a result of that meeting, Scales spoke to the plant manager Gary Lewis, who then spoke to Bob Shaw, employee relations manager for the Memphis DuPont plant.

On May 28, 1995, Shaw, Lee Ann Rice,[14] and Gary Fish[15] met with plaintiff to discuss her situation. During the course of that meeting, plaintiff recounted the full history of the harassment she had experienced in the peroxide area, including the allegation that Carney had tried to run her off the road the previous summer, and told them that she wanted this situation corrected. Testimony of Bob Shaw ("Shaw's Test."), Tr. at 1094; Testimony of Lee Ann Rice ("Rice's Test."), Tr. at 401; Pollard's Test., Tr. at 62. Subsequent to that meeting, Shaw and Swartz spoke to Carney about his behavior. Swartz's Test., Tr. at 968. Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04. In addition, neither Shaw, nor anyone else at

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[14] Rice is a manager in Human Resources. Her supervisor is Bob Shaw.

[15] Fish was a plant shift supervisor.

Dupont, ever investigated plaintiff's allegation that Carney had tried to run her off the road, after Shaw spoke to Carney and Carney denied that it had occurred. Shaw's Test., Tr. at 1102. Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations. Basham's Test., Tr. at 1250-51.

After Shaw spoke to Carney, Carney's behavior improved for about four weeks. During the week of July 5-11, 1995, however, Carney returned to his prior patterns of behavior. Pollard's Test., Tr. at 107. Another incident in which the vaporizer was taken out early without plaintiff's knowledge also occurred during this week. Id. at 89. Plaintiff went to David Swartz and begged him to "just get me off this shift, nothing's changed and I can't take it." Id. at 107. Rather than investigating the situation or moving Carney to another shift, Swartz spoke to plaintiff the next day and informed her that a control room operator position on another shift was available. Id. at 108; Swartz's Test., Tr. at 994-96. Plaintiff did not want to take this position because it was on the same shift with Rory Bricco, the man who had refused to take direction from her when she was a control room operator on "C" shift. Plaintiff told Swartz she would not bid for that position. Pollard's Test., Tr. at 108-09.

On July 28, 1995, plaintiff discovered a highlighted copy of the same Bible verse that Bricco had put on her desk when he refused to take direction from her in her mailbox at work. As noted above, that Bible verse read: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Tr. at 407 (quoting 1 Timothy 2:11). When plaintiff

discovered the Bible verse, she described her reaction as follows:

> I felt like I had been hit with a brick, I just couldn't believe that after all that had been talked about, they were asking me to go back into the control room . . . and I just considered [that] this was the men's answer to that.

Pollard's Test., Tr. at 110.

Subsequent to that event, plaintiff never returned to work at DuPont. A committee was formed to investigate the Bible verse incident. As with the other "investigations" that DuPont had initiated with regard to plaintiff's complaints, this one was wretchedly inadequate. The investigation consisted of asking an identical series of typed questions to each of the men on "A" shift individually, and to the other men in the peroxide area in groups. Shaw's Test., Tr. at 1106. All of the questions were answerable with a simple yes or no, and when all of the men denied having any knowledge of the incident, DuPont proceeded no further with the investigation. Shaw's Test., Tr. at 1268, 1270. No one from DuPont management ever questioned Steve Carney about whether he was involved in the Bible verse incident. Carney's Test., Tr. at 931.

After plaintiff left "A" shift, a party was held to celebrate her departure. Cobb's Test., Tr. at 277-79; Carney's Test., Tr. at 931-32. Steve Carney fried catfish and crappie that he had brought in, and the other men blew up balloons and taped them to the ceiling. Id. Mark Cobb testified that at the party Carney declared, "glad the bitch is

gone, glad the bitch is not coming back." Cobb's Test., Tr. at 278. Carney himself testified as follows:

> Q: Now, after she [plaintiff] left, there was a party in the peroxide are, wasn't there?
> A: Yes, ma'am.
> Q: And you participated in that party, correct?
> A: Yes, ma'am.
> Q: And there were balloons at that party, correct?
> A: Yes, ma'am.
> Q: And I believe there was crappie cooked, correct?
> A: Yes, ma'am.
> Q: And you do recall that, don't you?
> A: Yes, ma'am.
> Q: You were celebrating the departure of Sharon Pollard, weren't you?
> A: Yes, ma'am.

Carney's Test., Tr. at 931-32.

Plaintiff was on short-term disability leave for the next six months, during which time she saw a number of psychologists and psychiatrists that DuPont required her to visit. In particular, DuPont sent plaintiff to Dr. Fred Steinberg, who concluded she could not return to work. In spite of this opinion, however, DuPont scheduled a "return to work" meeting with plaintiff in February of 1996. At that meeting DuPont management would not guarantee that plaintiff would not be put back on a shift with Carney. Pollard's Test., Tr. at 219. Plaintiff told them that she could not return to work under those conditions, and DuPont

terminated her, effective February 29, 1996. Id. at 154, 217-19.

CONCLUSIONS OF LAW

Title VII prohibits discrimination "against any individual with respect to [her] compensation, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) . In Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment. As noted by the Sixth Circuit in Black v. Zaring Homes, Inc., 104 F.3d 822, 825 (6th Cir. 1997), the statute grants employees "the right to be work in an environment free from discriminatory intimidation, ridicule, and insult." 104 F.3d at 825 (quoting Meritor, 477 U.S. at 65).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed August 20, 1998]

No.95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that, in accordance with the Memorandum Opinion and Order, filed August 20, 1998, judgment is ENTERED in favor of plaintiff as follows:

a. Defendant is ORDERED to pay plaintiff $107,364.00 in back pay and accrued benefits;

b. Defendant is ORDERED to pay plaintiff $300,000.00 in compensatory damages, in

accordance with the statutory cap set forth in 42 U.S.C. § 198la(b) (3); and

c. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 8/20/98.

APPROVED:

/s/_____
JON PHIPPS MCCALLA
UNITED STATES DISTRICT COURT

August 20, 1998
Date

/s/_____
ROBERT R. DI TROLIO
Clerk of Court

_____
(By) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed August 25, 2000]

Nos. 98-6317 / 6319; 99-5125

SHARON B. POLLARD, *Plaintiff-Appellee/ Cross-Appellant,*	)
v.	)
E. I. DUPONT DE NEMOURS COMPANY, *Defendant-Appellant/ Cross-Appellee.*	)

ORDER

BEFORE: MERRITT, CLAY, and CUDAHY,* Circuit Judges.

* Hon. Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion of appellee/cross-appellant, and no judge of this court having requested a vote on the suggestion of appellant/cross-appellee, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Supreme Court, U.S.
FILED
DEC 8 2000
CLERK

No. 00-763

In The

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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December 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company. There are presently 13 publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada Inc. is a consolidated subsidiary, and the following companies are companies in which DuPont holds a minority, non-controlling interest:

Bionova Holding Corporation
Celgene Corporation
DuPont Photomasks, Inc.
Healtheon/WebMD Corporation
Hologic, Inc.
Hudson Technologies, Inc.
ImproveNet, Inc.
Kos Pharmaceuticals, Inc.
Maxygen Inc.
Shaman Pharmaceuticals Inc.
Syncor International Corporation
Trigon Healthcare, Inc.

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STATEMENT OF THE CASE

This Title VII action, alleging discrimination based on gender, was originally filed by Sharon B. Pollard ("Petitioner" or "Pollard") against E.I. du Pont de Nemours and Company ("Respondent" or "DuPont") in the United States District Court for the Western District of Tennessee in 1995. Pollard also alleged intentional infliction of emotional distress and negligence. After a trial to the court without jury, the district court awarded Petitioner $107,364 in back pay and accrued benefits, $300,000 in compensatory damages, attorney fees and costs on the discrimination claim. *Pollard v. E.I. du Pont de Nemours and Co.*, 16 F.Supp. 2d 913, 924 (W.D.Tenn. 1998).[1] The only part of the district court's opinion relevant to the issue presented here is a short statement in a footnote to the effect that the court was bound by the position of the Sixth Circuit that front pay is subject to the damage limitations contained in 42 U.S.C. § 1981a. *Pollard*, 16 F.Supp. at 923 n.19.

A timely appeal was taken by DuPont to the United States Court of Appeals for the Sixth Circuit. Pollard filed a cross-appeal on the limitation of front pay damages and as to the summary judgment that dismissed her state law claim. The Sixth Circuit reversed the judgment as to the district court's summary judgment in favor of DuPont and remanded for trial of the state law claim of the intentional infliction of emotional distress. In all other

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[1] Inexplicably, Petitioner failed to include the entire opinion of the district court in the appendix to her Petition. Therefore, when necessary, we will cite to the official report of the decision.

respects, the Sixth Circuit affirmed the judgment of the district court. (26a). The panel decision properly concluded that it was bound by that court's prior decision relative to the cap on front pay. (22a).

Petitions for rehearing and rehearing *en banc* of both parties were denied on August 25, 2000. (App. 49a). The Sixth Circuit's mandate to the district court issued on September 6, 2000. The state law claim is now in discovery and is scheduled to be tried in February, 2001. The instant Petition for Writ of Certiorari was filed with this Court on November 13, 2000.

REASONS WHY PETITION SHOULD BE DENIED

I.

THERE IS NO WIDESPREAD AND SIGNIFICANT CONFLICT AMONG THE CIRCUITS

Petitioner's principle argument is that there is a split of authority among the circuits as to whether front pay is subject to the cap of 42 U.S.C. § 1981a. However, a close examination of those cases reveals less than a square conflict of significant proportions to warrant this Court's intervention and plenary review at this time.

First, it is worthy to note that the instant decision does not expand any difference of approach to the question presented by the courts of appeals as Petitioner correctly notes (Pet. 4). The Sixth Circuit has been consistent in its position.

On the issue presented, the panel in the instant case was bound by the Sixth Circuit's prior decision in *Hudson*

v. Reno, 130 F.3d 1193 (6th Cir. 1997), *cert. denied*, 119 S.Ct. 64 (1998) (22a). In *Hudson*, the Sixth Circuit held that the statutory limit on damages applied to front pay. The subsequent denial of *en banc* review in the instant case (49a-50a) did not change the position of that court. The instant decision, therefore, does not affect the balance of opinions among the circuits that would warrant resolution by this Court.

Petitioner's sweeping assertion of a conflict of opinions (Pet. 5) does not withstand studied analysis. A deep, abiding division among the circuits is not as yet clear. For example, of the cases cited by Petitioner (Pet. 5), it can be fairly said that the D.C. Circuit's analysis of the issue is dicta. *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999), *cert. dismissed*, 120 S.Ct. 1155 (2000).[2] Only the Ninth Circuit deals at any length with the legislative history, and then without any real analysis of the plain language of the statute. *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1154 (9th Cir. 1999).

The remaining authorities, from the Eighth and Tenth Circuits, rely primarily on the comparison of front pay to equitable relief without any meaningful analysis of legislative history. *See Kramer v. Logan County School District No. R-1*, 157 F.3d 620, 625-26 (8th Cir.), *reh'g and reh'g en banc denied*, 1998 U.S. App. LEXIS 34126 (8th Cir. 1998);

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[2] Although not cited by Petitioner, the Seventh Circuit recently also addressed in dicta the issue presented but decided the case on much narrower grounds. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499, 501 (7th Cir. 2000).

Medlock v. Ortho Biotech, Inc., 164 F.3d 545 (10th Cir.), *cert. denied*, 120 S.Ct. 48 (1999).

Medlock is especially a problem for Petitioner's theory of conflict because, although the Tenth Circuit maintains that front pay is a form of equitable relief, a jury decided the question of front pay. *Medlock*, 164 F.3d at 555 n.8. It is settled that a jury should not be used to determine equitable relief. *See, e.g., Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1998); *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53, 55-56 (5th Cir. 1992). Therefore, it is highly questionable whether the Tenth Circuit's position is squarely in conflict with that of the Sixth Circuit.

It is also worthy of note that, except for the Eighth Circuit in *Kramer*, none of the circuit authorities cited by Petitioner have been through the helpful assay of a request for *en banc* review.[3]

II.

THE LOWER COURTS CONTINUE THE DELIBERATION AND ANALYSIS OF THE ISSUE PRESENTED

Although the question of caps on certain types of damages was introduced in 1991, it has been only in the last few years that differing views have begun to appear in the circuits as to the application to front pay. Indeed, the circuits generally have not added to the debate since this Court declined to hear *Medlock*. A significant number of circuits have yet to directly address that issue. For

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[3] There also has been, during the short period of time since these cases began to develop, little learned attention directed to this matter other than student notes.

example, the First Circuit recognized the question but failed to reach the issue in *Carey v. Mt. Desert Island Hospital*, 156 F.3d 31, 40 (1st Cir. 1998).

However, within the circuits yet to address or make a holding on the issue presented, the district courts continue to steep and percolate the issue. Within the Second Circuit, for example, *see Fernandez v. North Shore Orthopedic Surgery & Sports Medicine, P.C.*, 79 F.Supp. 2d 197, 204 (E.D.N.Y. 2000) (finding that front pay not subject to the statutory cap after only a brief legal vs. equitable remedy analysis). The court in *Oliver v. Cole Gift Centers, Inc.*, 85 F.Supp. 2d 109, 116 (D.Conn. 2000), recognized the issue but did not reach it.

The Third Circuit has not reached the issue presented by Petitioner. Nevertheless, the district courts continue to refine the analysis of the question presented here. *See Bates v. Bd. of Ed. of Capital Sch. Dist.*, No. 97-394-SLR 2000 U.S. Dist. LEXIS 4873, at *25-26 (D.Del. Mar. 31, 2000) (concluding that the Third Circuit would find that front pay is an equitable remedy and subject to the statutory limitation); *Gentner v. Cheyney Univ. of Pa.*, No. 94-7443, 1999 U.S. Dist. LEXIS 15905, at *93-95 (E.D. Pa. Oct. 14, 1999) (to the same effect).

It is clear from these decisions that the lower courts continue to develop the analysis of the relatively narrow issue that Petitioner seeks to have reviewed by this Court.

III.

THE INSTANT CASE DOES NOT PRESENT A GOOD VEHICLE FOR PLENARY RESOLUTION OF THE ISSUE PRESENTED

The instant case, due to procedural and factual anomalies, does not present a good vehicle for consideration of the issue presented by Petitioner.

First, the district court failed to make a finding of fact regarding how much, if any, damages would have been assessed as front pay. The only mention of that category of damages appears in a cryptic footnote under the district court's conclusions of law, without a hint as to amount. *Pollard*, 16 F.Supp. 2d at 924 n.19. In fact, the district court's annotation could be read that front pay was included in the award of the maximum compensatory damages. The fact that the district court was of the opinion that the maximum statutory amount of compensatory damages did not cover all of Pollard's losses begs the question that limiting damages was the very intent of the 1991 amendment to the Civil Rights Act.

Second, in that the state law claim has yet to be tried, allocation of damages between federal and state claims has not been possible in this unusual situation where state claims have been remanded to the district court for trial. *See, e.g., Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 509 (9th Cir. 2000); *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 618 (5th Cir. 1999).

Finally, other than noting the dispute regarding the ability of Petitioner to return to work prior to her termination (45a), the district court never made a finding that

reinstatement was impractical, a predicate to granting front pay. *United States v. Burke*, 504 U.S. 229, 239 n.9, 112 S.Ct. 1867, 1873 n.9 (1992); *Belk v. City of Eldon*, 228 F.3d 872, 883 (8th Cir. 2000). For these reasons, the district court has failed to provide a clear vehicle for this Court to determine the applicability of the statutory cap on damages to this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
FEB 22 2001

No. 00-763

In The

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 13, 2000
PETITION FOR CERTIORARI GRANTED JANUARY 8, 2001

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RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE #: 95-CV-3010

1	12/20/95	COMPLAINT Receipt #: 025061; Filing fee $120.00 (tmn) [Entry date 12/21/95]
3	1/16/96	ANSWER by defendant E. I. DuPont to [1-1] (tmn) [Entry date 01/17/96]
17	5/30/97	MOTION by defendant E. I. DuPont for summary judgment, or in limine (wmw) [Entry date 06/02/97]
32	7/11/97	RESPONSE by plaintiff Sharon B. Pollard, plaintiff John A. Pollard to motion for summary judgment [17-1], to motion in limine [17-2] AND SUPPORTING MEMORANDUM OF FACTS AND LAW . . . (placed in separate folder) (ehg) [Entry date 07/15/97]
47	7/29/97	ORDER PARTIALLY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER PARTIALLY GRANTING DEFENDANT'S MOTION IN LIMINE AND ORDER CONTINUING TRIAL by Judge Jon P. McCalla Granting motion for summary judgment [17-1] to the extent that it seeks to dismiss pltf's claim of negligent supervision, granted with

respect to pltf's claim for intentional infliction of emotional distress, granted with respect to Mr. Pollard's claim for loss of consortium, denied to the extent that it seeks summary judgment with respect to pltf's claims of sexual harassment under Title VII; motion in limine [17-2] seeking an order precluding pltf from offering proof of any alleged discriminatory acts prior to 12/20/94. . .for reasons set forth at the 7/22/97 pretrial conference, the court declines to resolve this issue at this time; terminating party John A. Pollard. Granting motion in limine [29-1] to the extent that it seeks to preclude pltf from utilizing, in any manner, the tape recordings. . . , pltf is ordered to produce all remaining tapes, if any, to dft by 7/30/97; denied to the extent it seeks to exclude the testimony or proof from Dr. Deperschmidt; instead the court modified the Rule 16(b) Scheduling Order . . . trial 9:30 10/14/97, pretrial conference 8:45 10/7/97, joint pretrial order, all motions in limine, proposed jury instructions, proposed voir dire questions due 5:00 9/30/97, pltf's Rule 26 expert disclosure due 8/12/97, dft's Rule 26 expert disclosure due 9/9/97; granting motion to continue setting [29-2] (cc: all counsel) (ssh) [Entry date 07/30/97] [Edit date 07/30/97]

64	10/14/97	MINUTES: Non-Jury Trial 10/14/97; opening remarks by Ms. Adams & Mr. Jacobson; Mr. Jacobson's motion to exclude Dr. Farmer's testimony - under advisement; Presiding Judge: McCalla; Pla Atty: K. Caldwell/Adams; Dft Atty: C. Jacobson C/R: Parker (wmw) [Entry date 10/15/97]
65	10/16/97	MINUTES: non-jury trial; pla's proof admitted-continued; Mr. Jacobson renewed motion to exclude Dr. Farmer's testimony in light of (2) suppl. reports - or to be allowed to depose Dr. Farmer - under advisement Presiding Judge: McCalla; Pla Atty: Caldwell/Adams; Dft Atty: Jacobson C/R: Parker (wmw) [Entry date 10/17/97]
66	10/17/97	MINUTES: . . .The trial will resume at 1:30 or 2:00 p.m. today Presiding Judge: McCalla; Pla Atty: Adams/Caldwell; Dft Atty: Jacobson; C/R: B. Parker (ssh) [Entry date 10/20/97] [Edit date 10/21/97]
71	10/24/97	MINUTES: Non-jury trial resumed 10/24/97; . . .[Entry date 10/28/97]
72	11/3/97	MINUTES: Trial resumed 11/3/97 . . . [Entry date 11/04/97]

73	11/4/97	MINUTES: non-jury trial continued 11/4/97; . . . [Entry date 11/05/97]
75	12/15/97	PROPOSED Findings of Fact and Conclusion of Law submitted by defendant E.I. DuPont (ssh) [Entry date 12/17/97]
88	12/22/97	PROPOSED Findings of Fact and Conclusions of law submitted by plaintiff Sharon B. Pollard (ssh) [Entry date 12/29/97]
91	8/20/98	MEMORANDUM OPINION AND ORDER: by Judge Jon P. McCalla . . Pla has, therefore, satisfied each of the elements necessary to prove that she was subjected to a hostile work environment based on her gender in violation of Title VII, and judgment is ENTERED in favor of pla as follows: 1) Dft is ORDERED to pay pla $107,364.00 in back pay and accrued benefits; 2) Dft is ORDERED to pay pla $300,000.00 in compensatory damages, in accordance with the statutory cap set forth in 42 USC 1981a(b)(3); and 3) Dft is ORDERED to pay pla's attorney fees and costs. Pla shall submit a statement of fees and costs related to this matter to the court by 9/15/98. Dft may file a response to pla's submittal by 9/30/98. The Court will then determine the appropriate amount of attorneys fees and costs to

		be awarded, and will so advise the parties. terminating case (cc: all counsel) (ehg) [Entry date 08/20/98]
92	8/20/98	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [91-2]. . in accordance with the Memorandum Opinion and Order, filed 8/20/98, judgment is entered in favor of plaintiff. .(cc: all counsel) (ehg) [Entry date 08/20/98]
98	9/17/98	NOTICE OF APPEAL by defendant E.I. DuPont from Dist. Court decision [92-1] (ehg) [Entry date 09/21/98]
102	9/21/98	NOTICE OF CROSS APPEAL by plaintiff Sharon B. Pollard from Dist. Court decision [92-1] (ehg) [Entry date 09/21/98]
103	9/21/98	MOTION AND SUPPORTING MEMORANDUM by defendant E.I. DuPont for stay of execution of judgment and waiver of the supersedeas bond requirement (ehg) [Entry date 09/22/98]
105	9/22/98	MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY FEES AND COSTS . . . by plaintiff Sharon B. Pollard (ehg) [Entry date 09/24/98]

113	10/2/98	RESPONSE by plaintiff Sharon B. Pollard to motion for stay of execution of judgment and waiver of the supersedeas bond requirement [103-1] (ehg) [Entry date 10/05/98]
117	10/14/98	RESPONSE IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEY'S FEES w/ attachments . .by defendant E.I. DuPont to [105-1] (ehg) [Entry date 10/14/98]
119	10/27/98	ORDER STAYING EXECUTION OF JUDGMENT AND WAIVING SUPERSEDEAS BOND REQUIREMENT . . . by Judge Jon P. McCalla granting motion for stay of execution of judgment and waiver of the supersedeas bond requirement [103-1] (cc: all counsel) (ehg) [Entry date 10/27/98]
120	11/2/98	REPLY/KATHLEEN L. CALDWELL'S RESPONSE TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES w/attachments by plaintiff Sharon B. Pollard re [105-1] (ehg) [Entry date 11/05/98]
128	12/9/98	ORDER OF ATTORNEYS' FEES AND COSTS. . .by Judge Jon P. McCalla .. The Court ORDERS Defendant to pay plaintiff's counsel

		$204,400 in fees and $12,497.99 in costs. For the reasons stated in the Court's 10/27/98 order in this matter, the Court STAYS execution of this judgment pending the appeal of this matter, and WAIVES the supersedeas bond requirement. (cc: all counsel) (ehg) [Entry date 12/09/98]
129	12/9/98	JUDGMENT IN A CIVIL CASE: by Judge Jon P. McCalla re [128-2]..in accordance with the Court's Order of Attorneys' Fees and Costs, judgment in the amount of $216,897.99 is hereby ENTERED in favor of plaintiff and against defendant. (cc: all counsel) (ehg) [Entry date 12/09/98]
132	12/28/98	NOTICE OF APPEAL by defendant E.I. DuPont from Dist. Court decision [129-1] (ehg) (regarding reward of atty fees & costs) [Entry date 12/30/98]
139	2/23/99	ORDER Entered: 2/17/99 from 6th Circuit dismissing the appeal [132-1] as duplicative (ssh) [Entry date 02/23/99]
140	5/30/00	JUDGMENT AND SLIP OPINION from USCA (entered 5/26/00): . . .it is ordered that the grant of summary judgment to dft is affirmed in part, reversed in part, and the case is remanded for trial in accordance with the opinion of this court. It is further ordered that the district court's award

		of atty's fees is affirmed. reversing and remanding the Decision of the District Court [Appeal [134-1], reversing and remanding the Decision of the District Court [Appeal [102-1], reversing and remanding the Decision of the District Court [Appeal [98-1] (ssh) [Entry date 05/31/00]
145	10/18/00	MOTION by plaintiff Sharon B. Pollard for attorney fees and costs (yds) (for appellate work) [Entry date 10/18/00]
162	12/4/00	NOTICE from the Supreme Court of the United States: the petition for a writ of certiorari was filed 11/13/00 and placed on the docket 11/13/00 as No. 00-763. (ssh) [Entry date 12/04/00]
165	12/15/00	CONSENT ORDER by Judge Jon P. McCalla: Pla's motion for award of attorneys fees and costs be and hereby stricken [145-1] (cc: all counsel) (ehg) [Entry date 12/18/00]
178	1/11/01	ORDER Of Stay by Judge Jon P. McCalla; The Supreme Court of the United States has granted certiorari from the decision of the Court of Appeals for Sixth Circuit in this matter; The court grant of a writ of certiorari operates as a stay of proceedings in lower courts; The court

		STAYS all proceedings in this matter pending the resolution of the appeal to the Supreme Court;, CASE STAYED (cc: all counsel) (bag) [Entry date 01/12/01]
180	1/16/01	NOTICE from the Supreme Court of the United States: the petition for a writ of certiorari is granted. (ssh) [Entry date 01/17/01]

CIVIL DOCKET FOR CASE: 98-CV-2147

1	2/18/98	COMPLAINT (Summons(es) issued) Receipt #: 36878; Filing fee $150.00; w/exhibits (bag) [Entry date 02/23/98]
9	4/6/98	ANSWER by defendant E.I. DuPont to [1-1] (ehg) [Entry date 04/08/98]
23	7/30/98	MOTION by defendant E.I. DuPont for summary judgment (ssh) [Entry date 07/31/98]
24	7/30/98	MEMORANDUM by defendant E.I. DuPont in support of motion for summary judgment [23-1] Placed in separate folder (ssh) [Entry date 07/31/98]
25	7/30/98	STATEMENT of undisputed material facts by defendant E.I. DuPont in support of motion for summary judgment [23-1] (ssh) [Entry date 07/31/98]

32	8/4/98	MOTION by plaintiff Sharon B. Pollard for summary judgment (ssh) [Entry date 08/04/98]
33	8/4/98	MEMORANDUM by plaintiff Sharon B. Pollard in support of motion for summary judgment [32-1] (ssh) [Entry date 08/04/98]
46	9/8/98	RESPONSE by plaintiff Sharon B. Pollard to dft's motion for summary judgment [23-1] (ssh) [Entry date 09/09/98]
49	3/30/99	ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT by Judge Jerome Turner granting in part and denying in part motion for summary judgment [32-1], granting motion for summary judgment and denying in part [23-1]. . .For the foregoing reasons, both pltf's and dft's motions for summary judgment will be treated as motions for judgment. Pltf's motion is denied with respect to her assertion that dft's denial of benefits under the disability plan was arbitrary and capricious, but is granted with respect to her assertion that dft's denial of benefits under the retirement plan was arbitrary and capricious. Correspondingly, dft's motion is granted with respect to its assertion that its denial of benefits under the disability plan was not arbitrary and

		capricious, but is denied with respect to its assertion that dft's denial of benefits under the retirement plan was not arbitrary and capricious. The parties shall have ten days from the entry of this order to file briefs regarding what damages pltf is entitled to. . . (cc: all counsel) (sk) [Entry date 03/30/99]
52	5/10/99	BRIEF FILED by defendant E.I. DuPont regarding plaintiff's damages re [49-1] (w/Exhibits 1-6 Attached) (sk)
61	5/24/99	ORDER ON DAMAGES by Judge Jerome Turner . . . For the foregoing reasons, pltf's request for prejudgment and postjudgment interest is granted. The parties shall jointly compute interest to be paid pltf in accordance with the directions of this order and file a joint statement regarding that amount within eleven days of the entry of this order. Pltf's request for punitive damages, liquidated damages, and attorney's fees is denied. . . (cc: all counsel) (sk) [Entry date 05/24/99]
64	6/4/99	ORDER ON PREJUDGMENT INTEREST by Judge Jerome Turner . . . dft's submission is inaccurately calculated because it fails to include principal payments for the period 5/97 through 2/98, and further that it fails to

take into account interest payments on the principal payments missed prior to judgment. The pltf has submitted calculations for most months during the period to the entry of this order and, according to the court's calculations, the interest requested appears to be accurately computed and shall be adopted by the court. Therefore, judgment shall be entered awarding pltf principal benefits in the amount of $57,360.00, plus prejudgment interest of $3,221.68, through $57,360.00, plus prejudgment interest of $3,221.68, through June 3, 1999. . . (cc: all counsel) (sk) [Entry date 06/04/99]

65 6/7/99 JUDGMENT: by Judge Jerome Turner dismissing case. . .It Is Ordered And Adjudged that, in accordance with the Orders docketed 3/30/99 and 6/4/99, Pltf is awarded principal benefits in the amount of $57,360.00, plus prejudgment interest in the amount of $3,221.68, through 6/3/99, for which let execution issue. . .(cc: all counsel) (sk) [Entry date 06/07/99]

Sixth Circuit Docket 98-6317/6319 & 99-5125

5/26/00 OPINION filed: The district court's decision to grant summary judgment to Dupont is REVERSED and remanded for trial, otherwise the judgment of the

district court awarding attorney's fees is AFFIRMED. Plaintiff's motion to strike Pollard's reply brief is denied, decision for publication pursuant to local rule 206 [98-6317, 98-6319, 99-5125]. Gilbert S. Merritt, Authoring Judge, Eric L. Clay, Circuit Judge, Richard D. Cudahy, Circuit Judge. (cb) [98-6317 98-6319 99-5125]

5/26/00 JUDGMENT: AFFIRMED in part REVERSED in part and remanded. (cb) [98-6317 98-6319 99-5125]

6/2/00 PETITION for en banc rehearing filed by Alayne B. Adams and Kathleen L. Caldwell for Appellee Cross-Appellant Sharon B. Pollard. Certificate of service date 6/1/00. [98-6317, 98-6319, 99-5125] (blh) [98-6317 98-6319 99-5125]

6/9/00 BRIEF filed by Geoffrey L. Carter for Amicus Curiae EEOC in support of appellee/cross-appellant's petition for rehearing en banc. Copies 25. Certificate of service date 6/8/00. Number of Pages: 14. [98-6317, 98-6319, 99-5125](blh) [98-6317 98-6319 99-5125]

6/23/00 ADDITIONAL PETITION for en banc rehearing filed by N. Victoria Holladay for Appellant Cross-Appellee E I DuPont. Certificate of service date

	6/22/00. [98-6317, 98-6319, 99-5125] (blh) [98-6317 98-6319 99-5125]
8/25/00	ORDER filed denying petition for en banc rehearing [2175711-1] filed by N. Victoria Holladay and the petition for en banc rehearing [2163619-1] filed by Alayne B. Adams and Kathleen L. Caldwell [98-6317, 98-6319, 99-5125]. Gilbert S. Merritt, Eric L. Clay, Richard D. Cudahy (7th Circuit), Circuit Judges. (blh) [98-6317 98-6319 99-5125]
9/6/00	MANDATE ISSUED with no cost taxed [98-6317, 98-6319, 99-5125] (cb) [98-6317 98-6319 99-5125]
11/20/00	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Cross-Appellant Sharon B. Pollard in 98-6317, Appellee Cross-Appellant Sharon B. Pollard in 98-6319, Appellee Sharon B. Pollard in 99-5125. Filed in the Supreme Court on 11-13-00, Supreme Ct. case number: 00-763. [98-6317, 98-6319, 99-5125] (swh) [98-6317 98-6319 99-5125]
1/12/01	U.S. Supreme Court letter filed granting petition for writ of certiorari [2258859-1] filed by Sharon B. Pollard, Sharon B. Pollard, Sharon B. Pollard [98-6317, 98-6319, 99-5125] in

98-6317, 98-6319, 99-5125. Filed in the Supreme Court on 01-08-01. (swh) [98-6317 98-6319 99-5125]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed January 11, 2001]

No. 95-3010 M1/V

SHARON B. POLLARD and	)
JOHN A. POLLARD,	)
Plaintiffs,	)
	)
v.	)
	)
E.I. DUPONT DE NEMOURS CO.,	)
Defendant.	)
	)

ORDER OF STAY

The Supreme Court of the United States has granted certiorari from the decision of the Court of Appeals for the Sixth Circuit in this matter. Pollard v. E.I. Dupont de Nemours, No. 00-763, 2001 WL 12416 (U.S. Jan 8, 2001). The grant of a writ of certiorari operates as a stay of proceedings in lower courts. United States v. Eisner, 323 F.2d 38, 42 (6th Cir. 1963). Accordingly, the Court STAYS all proceedings in this matter pending the resolution of the appeal to the Supreme Court.

ENTERED this 11 day of January, 2001.

/s/_____
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Filed March 30, 1999]

NO.98-2147-TUA

SHARON B. POLLARD, *Plaintiff,*	)
v.	)
E.I. DUPONT DE NEMOURS CO., *Defendant.*	)

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Sharon Pollard filed this action alleging that defendant E.I. DuPont De Nemours, Inc. breached the terms of its Total and Permanent Disability Plan ("the disability plan"), which is a welfare benefit plan as defined by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., in its denial of benefits. Presently before the court are the parties' cross-motions for summary judgment.

I. The Parties' Motions

Although Pollard's complaint is limited to the denial of benefits under DuPont's disability plan, at issue is DuPont's denial of benefits under both its disability plan and

its Pension and Retirement Plan ("the retirement plan").[1] The parties have moved for summary judgment on the denial of benefits under both plans.

A motion for summary judgment is normally an inappropriate vehicle to resolve disputes concerning eligibility for benefits under an ERISA plan. Wilkins v. Baptist Healthcare System, Inc., 150 F.3d 609, 619 (6th Cir. 1998). Instead, a court should conduct a "review based solely upon the administrative record and render findings of fact and conclusions of law accordingly." Id. In so doing, the court's review is limited to the record that was before the administrator, although the court may consider the parties' arguments concerning the proper analysis of the evidentiary

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[1] Pollard originally filed for benefits under both the disability plan and the retirement plan. Defendant issued a single letter denying both claims, and then issued a single letter rejecting Pollard's appeal on both claims. Plaintiff then sued, alleging in her complaint that defendant breached the terms of the disability plan. Normally, the court would limit its focus to the subject matter of plaintiff's complaint. However, on July 30, 1998, defendant filed its motion for summary judgment where it defined the term "plan" in this case as referring to both the disability and the retirement plan. Plaintiff filed her motion for summary judgment several days later, where, similar to the complaint, plaintiff asked for relief under the disability plan, but throughout her memorandum in support of that motion plaintiff addressed and relied on the provisions of both plans. It appears as though plaintiff did not realize these were two distinct plans. Nevertheless, rather than raise any objection in response to plaintiff's motion, defendant's arguments in response revolved largely around the interpretation of provisions within the retirement plan, and defendant again defined "plan" as referring to both plans. Pursuant to Fed. R. Civ. P. 15, the court will treat the complaint as if it alleged an improper denial of benefits under both the disability plan and the retirement plan.

materials contained in that record. An exception to this limitation on the scope of review exists for evidence that "is offered in support of a procedural challenge to the administrator's decision, such as an alleged lack of due process afforded by the administrator or alleged bias on its part." Id. Pursuant to the court's order of September 8, 1998, the court will also consider the affidavits of Steven Harrison and Dr. Benjamin Ramirez, filed by defendant, and Pollard's affidavit to the extent it provides information relating to the administrative or benefits process, but not relative to her medical condition.

Accordingly, the court will render findings of fact and conclusions of law based solely on its review of the administrative record and the specified affidavits, and will treat the parties' motions for summary judgment as motions for judgment. See Franklin v. Gibson, ___ F. Supp.2d ___, 1999 WL 137623, at *1 (M.D. Tenn. March 8, 1999); Marchetti v. Sun Life Assurance Co., 30 F. Supp.2d 1001, 1004 (M.D. Tenn. 1998).

II. Standard of Review

Denials of benefits by ERISA employee benefit plan administrators are "to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case the denial should be reviewed under an arbitrary and capricious standard. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Perry v. United Food & Commercial Workers Dist. Unions, 64 F.3d 238, 242 (6th Cir. 1995). It is undisputed that both plans in question give DuPont discretionary authority to determine eligibility for benefits and to construe the terms of the respective plans. Accordingly, the

court will review the administrator's decisions using the arbitrary and capricious standard.

The arbitrary and capricious standard "is the least demanding form of judicial review of administrative action . . . . When it is possible to offer a reasonable explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary and capricious." Perry, 64 F.3d at 242 (internal quotations and citations omitted). The reasonableness of the explanation, however, must be looked at in light of the terms of the plan. See Miller, 925 F.2d at 984 (finding an administrator's determinations are "not arbitrary and capricious if they are rational in light of the plan's provisions"); Callahan v. Rouge Steel Co., 941 F.2d 456, 460 (6th Cir. 1991) (finding that the most important factor to weigh in determining whether the administrator was arbitrary and capricious "is the language of the plan itself as known by the employees, or as the employees should have known.").

The deference paid an administrator's decision can be tempered where an inherent conflict of interest exists. "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor [ ] in determining whether there is an abuse of discretion.'" Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 984 (6th Cir. 1991) (quoting Bruch, 489 U.S. at 115). See also Peruzzi v. Summa Medical Plan, 137 F.3d 431, 433 (6th Cir. 1998); Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989). It is undisputed that the DuPont plans in question are self-funded and self-administered. Accordingly, the court will consider this factor as it reviews the administrator's determinations under the arbitrary and capricious standard.

III. Background

Pollard was employed by DuPont as an Operator at its manufacturing facility in Memphis, Tennessee, from 1977 until her termination on or around February 29, 1996. An Operator is required to do heavy lifting, withstand temperature extremes, use simple hand tools, operate fork lift trucks, operate chemical equipment, turn valves, perform shift work, wear breathing apparatus equipment, climb stairs and work overtime.

While employed by DuPont, Pollard was a participant in both DuPont's Total and Permanent Disability Plan and its Pension and Retirement Plan. Both plans are administered by the Board of Pensions and Benefits. The disability plan provides, in relevant part, that "each employee shall be eligible for benefits under this Plan if he becomes disabled after the date he completes one year of service and his service is terminated because of total and permanent disability on or after the effective date." The disability plan states that an individual will be considered "totally and permanently disabled" if the administrator determines "that [the participant] is totally disabled by injuries or disease and presumably will be totally and permanently prevented from pursuing any gainful occupation." The disability plan reserves the administrator's right to require in support of an application for benefits satisfactory medical evidence of permanent and total disability. What constitutes "satisfactory medical evidence" is to a large extent left to the discretion of the administrator, and it may require "a report from the individual's physician and other appropriate information and documentation as part of the basis for determining total and permanent disability."

The retirement plan provides, in relevant part, that "[a]n employee may be retired by the Company if the [administrator] finds that he has become, for any reason, permanently incapable of performing the duties of his position with the degree of efficiency required by the Company, and he has at least 15 years of service." Although the retirement plan vests discretion in the administrator to determine eligibility for benefits, unlike the disability plan it makes no specific mention of what type of evidence may be required to support a claim of incapability.

On or around July 31, 1995, Pollard took leave from her job on short-term disability. In her complaint, Pollard alleges that her disability arose out of sexual harassment suffered at DuPont. The short-term disability period ended on or about February 29, 1996, but Pollard never returned to work.

On February 27, 1996, Pollard, with the assistance of Robert Shaw, a Human Resources Manager at DuPont, filed a Case Determination Letter that functioned as an application for benefits under both the retirement and disability plans. Attached to that application, and in support of Pollard's claim, were the submissions of Dr. Janet Hill and Dr. F. A. Steinberg.

Pollard was referred to Dr. Hill, a clinical psychologist, sometime around August 1995. Beginning on September 6, 1995, Dr. Hill sent DuPont a series of letters pertaining to Pollard's status. In the September 6, 1995 letter, Dr. Hill diagnoses Pollard as suffering from Post Traumatic Stress Disorder-Acute and opines that Pollard is not currently capable of returning to work because of the severity of her symptoms and a guarded prognosis. According to Dr. Hall, Pollard's return to work "would likely exacerbate

her symptoms due to exposure to external cues representing the trauma she has experienced." In a letter dated November 13, 1995, Dr. Hill writes that Pollard appears to have made some mild improvement in response to medication, but her return to work is still not feasible because such a return would exacerbate her symptoms of anxiety. On December 13, 1995, Dr. Hill again wrote DuPont stating that Pollard appears to continue in her improvement, but that she recommends Pollard continue her leave of absence at least through the end of January 1996. In a letter dated January 29, 1996, Dr. Hill reports that although Pollard's symptoms have not been completely eliminated, she recommends that Pollard return to work on a trial basis. Also in that letter, Dr. Hill explains that she hopes that allowing Pollard to return to work will alleviate some of Pollard's stress and anxiety about job security. On February 26, 1996, Dr. Hill wrote DuPont, to follow up on a message she allegedly left on February 12, 1996, in which she reversed course and reported that as per that earlier message, she does not feel Pollard is capable of returning to work, nor does she feel that Pollard's returning to her previous work environment would be recommended. In a letter dated February 29, 1996, Dr. Hill expands upon the February 26 letter and states as follows:

> I am writing again to confirm Sharon Pollard's disability and to state my opinion that she is unable to return to her former workplace in any capacity. In addition, it is my opinion that Ms. Pollard will be unable to engage in any work, particularly that which involves her coming into contact with people she does not know.
>
> In my opinion, Ms. Pollard's disability is a direct result of trauma she experienced in the

> workplace leading to her diagnosis of Post Traumatic Stress Disorder Chronic (309.81). [Dr. Hill's letter then lists several symptoms of Pollard's ailment].
>
> These symptoms appear to have resulted from Ms. Pollard's fear of physical injury by other co-workers. They have been present for many months, and cause clinically significant impairment, both social and occupational functioning.

In early 1996, DuPont hired Dr. Steinberg, also a clinical psychologist, to, as stated in Dr. Steinberg's report, "determine 1) whether Ms. Pollard has the ability to go back to work without deteriorating, and 2) to assess whether the following series of work related events were responsible for precipitating her present psychological condition." There is no evidence in the record that Dr. Steinberg was made aware of the provisions in the plans requiring total and permanent disability or incapability to return to work at DuPont's standards before benefits could be collected. DuPont required Pollard to submit to psychological evaluation by Dr. Steinberg, and Dr. Steinberg saw Pollard at his office on several occasions in January 1996. On January 29, 1996, Dr. Steinberg submitted a letter to DuPont pertaining to his evaluation of Pollard. In that letter, Dr. Steinberg stated that "[i]t is my opinion that [Pollard] will deteriorate and experience similar psychological problems if she resumes her position. For this reason, I feel that her ability to resume her duties is questionable." Dr. Steinberg based his conclusion on Pollard's own statements while being interviewed, Dr. Steinberg's observations of her during the interview, and psychological testing, that included application of several objective medical tests, such as the Wechsler Adult

Intelligence Scale-Revised (WAIS-R); Minnesota Multiphasic Personality Inventory-2 (MMPI-2); and the Rorschach Inkblot Technique. Dr. Steinberg issued a lengthy and detailed report interpreting his results, which contained a summary of results which are set forth as follows.

> Summary of Psychological Test Results
> The above interpretations concur with indications that the patient is presenting manifestations of an established personality and adjustment style, rather than an acute condition. Her present state of declared disability is not presently interfering with cognitive/intellectual abilities. There are no indications of decline in cognitive/intellectual functioning due to her present psychological manifestations.
>
> This is a tense, anxious and angry individual who feels personal discomfort when significant others fail to treat her as she deems necessary. She is prone to be self centered and narcissistic. She will be highly sensitive to others' failure to treat her consistent with her own narcissistic self concerns. In this sense, others will not live up to her expectations. Perceived interpersonal frustration will foster feelings of self devaluation.
>
> . . . .
>
> There are no indications of clinical depression or Posttraumatic Stress Disorder within the testing. Psychological test data do not indicate that reality testing is impaired. She is highly

suspicious. Poor reality testing results from her interpersonal oversensitivity. She will embellish her perceptions with preconceived interpretations of her environment. She is very stubborn in dealing with social situations. Her passive-aggressive style will be employed as a vehicle for anger expression. This will foster a continuance of her present complaints in response to her presently perceived situation.

Summary

. . . .

Inefficiency and deterioration of psychological functioning has occurred over the past 14 years due to numerous types of stressors. Therefore, her present concerns regarding harassment cannot be considered as a sole precipitating factor in her present condition. Inefficiency and deterioration in psychological functioning should be considered as a function of her adaptive style historically, with relative severity cumulative in nature. If she should return to work, a resurgence of symptom expression would occur. Due to the probability of subsequent deterioration, her return to work is not advised.

Recommendations

. . . .

2. Return to work is not recommended.

On May 23, 1996, DuPont advised Pollard by letter that her claim for benefits under the disability and retirement plans had been denied. The letter stated that "[i]t was determined that you are not permanently incapable of performing the duties of available work with the degree of efficiency required by the Company," as required by the retirement plan. The letter also stated that "[m]edical information considered in the determination indicated that you have mental problems. However, the medical evidence submitted does not support a conclusion that you are permanently incapable of performing the duties of a Manufacturing Assistant with the degree of efficiency required by the Company." The medical evidence relied upon to arrive at this determination consisted of the letters from Dr. Hill, the letter from Dr. Steinberg and the corresponding report, and a Medical Evaluation Report prepared by Kathleen Cook, R.N. This evidence was reviewed by Dr. Benjamin Ramirez, who was the Corporate Associate Medical Director for defendant.[2] Dr. Ramirez never examined Pollard, but found the evidence submitted in support of her claim lacked any objective medical indication that she was permanently incapable of returning to work. Dr. Ramirez recommended that Pollard's claim be denied, and that recommendation was adopted by a representative of the Human Resources Department, Carol L. Killeen, and then by the administrator. The denial letter informs Pollard of her right to appeal to the

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[2] The Medical Evaluation Report prepared by Cook summarizes Pollard's physical characteristics, references the submissions of Drs. Hall and Steinberg, and describes Pollard's past medical history. On that report, Dr. Ramirez states that based on Cook's report and the submissions of Drs. Hill and Steinberg the Medical Division's evaluation is that Pollard is not incapable of pursuing any gainful employment and that she does not require special job consideration.

administrator and states that in order to be successful on appeal she "must provide additional objective evidence that will indicate a total impairment of function. Examples of objective evidence are significant or positive results of testing mental and complete medical evaluations. Opinions of healthcare providers are not sufficient without objective medical evidence to support such opinions."

In response, Pollard advised defendant that she was appealing the administrator's decision and in support of her appeal she submitted letters from Dr. Richard Farmer, a psychiatrist with the UT Medical Group, and Dr. J. Brody, her treating physician. Prior to denying her claim, DuPont had required Pollard to submit to an evaluation by Dr. Farmer,[3] for, as stated in Dr. Farmer's report, "the purpose of determining the level of disability." There is no evidence in the record that Dr. Farmer was made aware of the specific plan provisions in question, or that he should issue a prognosis with those provisions in mind. In a letter to DuPont dated May 3, 1996, Dr. Farmer states, in pertinent part, as follows:

> Diagnostic impression: Post Traumatic Stress Disorder, chronic, with major depression.
>
> The patient may well have some borderline and passive aggressive personality traits and these undoubtedly played a role in her overall discomfort. However, I agree [with Dr. Hill

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[3] Although Dr. Farmer conducted his evaluation prior to the letter of denial being issued, his evaluation was not considered in connection with the original denial.

> and Dr. Steinberg] that she is disabled at this time and requires further psychiatric care. . . . My only suggestion would be that she be more vigorously treated with anti-depressant medication, and that she seek a psychiatrist for this purpose. Post traumatic stress symptoms are treatable and she should be further along in her improvement status at this point than she actually is.

Dr. Brody did not dispute the conclusions of the three other professionals who had actually examined Pollard. In his letter dated June 11, 1996, Dr. Brody states, in part, as follows:

> [Pollard] developed progressive anxiety and sleep disturbance, followed by dysthymic symptomatology. She had to leave her job in order to avoid further psychological impairment.
>
> Ms. Pollard has further been evaluated by several mental health professionals including Janet Hill PhD and Richard Farmer M.D. All of which concluded that psychological injury occurred.
>
> Since the initiation of antidepressant therapy, Ms. Pollard's symptoms have improved, but also part of the treatment has been the escape from the work-place environment which caused her injury. She will require continuation of medical therapy and needs psychotherapy to assist in her recovery.

In considering Pollard's appeal, the administrator reviewed the submissions of Dr. Brody and Dr. Farmer in conjunction with the past submissions of Dr. Steinberg and Dr. Hill. By letter dated February 27, 1997, defendant informed Pollard that "[t]he medical information reviewed indicated that you have had mental problems. However, the Board determined that there is no objective medical evidence that supports a conclusion you were permanently incapable of performing available work at the time of your termination on 2/29/96 and therefore, are not eligible for an Incapability Pension and benefits pursuant to the Total and Permanent Disability Income Plan."

IV. Pollard's Eligibility for Benefits Under the Plans

1. The Retirement Plan

Based on the record, the court finds that the administrator's decision to deny benefits under the incapability provision of the retirement plan was arbitrary and capricious. The incapability provision provides that "[a]n employee may be retired by the Company if the [administrator] finds that he has become, for any reason, permanently incapable of performing the duties of his position with the degree of efficiency required by the Company, and he has at least 15 years of service."[4]

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[4] The court notes that while this provision states that defendant "may" retire an employee who meets the provision's requirements, defendant has not argued that it has discretion as to whether to grant retirement should Pollard show that she meets those requirements.

Pollard has submitted the evaluations of two psychologists (Dr. Hill and Dr. Steinberg), a psychiatrist (Dr. Farmer), and her treating physician (Dr. Brody). The court emphasizes the fact that these were not all professionals of Pollard's choosing; rather, DuPont referred Pollard to Dr. Hill, required Pollard to submit to a psychological examination by Dr. Steinberg, and required her to submit to an evaluation by Dr. Farmer. In her last letter to DuPont, Dr. Hill opined that Pollard was unable to return to her former workplace in any capacity. In his letter, Dr. Steinberg opined that Pollard would deteriorate and experience similar psychological problems if she resumed her position and that her ability to resume her duties was therefore questionable. In his report, based largely on his interpretation of the application of objective medical tests, Dr. Steinberg more strongly stated that "[i]f [Pollard] should return to work, a resurgence of symptom expression would occur. Due to the probability of subsequent deterioration, her return to work is not advised." In his letter, Dr. Farmer agreed with Drs. Hill and Steinberg that Pollard was currently disabled and that she needed psychiatric care. In his letter, Dr. Brody stated that Pollard "had to leave her job in order to avoid further psychological impairment" and that any improvement was due in part to her escape from the DuPont workplace environment.

In denying Pollard's claim, defendant relied largely on the recommendation of Dr. Ramirez, an in-house physician. Dr. Ramirez's recommendation was based entirely on his review of Pollard's submissions. There is no evidence to suggest that Dr. Ramirez examined or ever even met Pollard. There is no evidence that Dr. Ramirez has any experience in dealing with mental disorders. To the contrary, Dr. Ramirez states that his specialty is in occupational medicine, a

specialty concerned with the health and safety of the workplace.

In summary, the record is as follows. Four physicians, three of whom Pollard was either referred to or required to see by defendant, reported that Pollard was unable to return to work at DuPont. Two of these professionals were clinical psychologists, one was a psychiatrist and one was her treating physician. One of the clinical psychologists based his conclusions on the results of objective medical tests. In denying Pollard's claim, the administrator relied on the recommendation of an in-house physician, who practiced primarily in the field of occupational medicine, who never examined or even met Pollard. Relying on the opinion of an in-house physician who was not specialized in the field and who never examined Pollard was arbitrary and capricious in light of the overwhelming evidence concerning Pollard's capacity to return to work. See Donaho v. FMC Corp., 74 F.3d 894, 900-01 (8th Cir. 1996) (finding administrator's reliance on a reviewing physician who never examined participant was an abuse of discretion where the reviewing physician's conclusions were contradicted by the opinions of an examining physician and two treating physicians).

There are other reasons justifying the court's decision. For instance, the court is convinced that the administrator failed to properly interpret the terms of the retirement plan. Initially, the court notes that defendant made one review and issued one letter of denial, but there were two different plans with two different requirements for eligibility. In the letter of denial, defendant wrote that "[i]t was determined that you are not permanently incapable of performing the duties of available work with the degree of efficiency required by the Company," and that "the medical evidence submitted does not support a conclusion that you are permanently incapable of

performing the duties of a Manufacturing Assistant with the degree of efficiency required by the Company." (emphasis added). It is not clear what is meant by these statements. The only relevant inquiry, under the terms of the retirement plan, is whether Pollard was capable of returning to work as an Operator up to the level of efficiency required by DuPont. Perhaps defendant confused the requirements of eligibility under the retirement plan with the requirement under the disability plan that the participant be totally and permanently prevented from pursuing any gainful occupation. Defendant also writes in its letter of denial that in order to succeed on appeal, Pollard "must provide additional objective evidence that will indicate a total impairment of function." If read literally, this would require Pollard's death. If read only as requiring evidence of a total impairment of function as an Operator, such a reading still far exceeds any requirement under the retirement plan. Again, the relevant inquiry should have been whether Pollard was permanently incapable of performing the duties of an Operator with the degree of efficiency required by DuPont. These discrepancies were not resolved in the subsequent letter denying Pollard's appeal, as defendant again wrote "that there is no objective medical evidence that supports a conclusion you were permanently incapable of performing available work." (emphasis added).

Furthermore, the administrator's requirement that Pollard submit objective medical evidence in order to be successful on appeal was not rational under the facts of this case. Defendant's letter of denial listed as examples of acceptable objective evidence "significant or positive results of testing mental and complete medical evaluations." Ignoring the fact that this sentence makes little grammatical sense and requires the reader to make certain assumptions, it provides little direction as to what is actually required. Here, Pollard had already submitted the report of Dr. Hill who had

conducted several interviews with Pollard. Are not interviews a form of mental testing? Why was that not acceptable? If defendant required a more objective form of a test, why were the tests administered by Dr. Steinberg and upon which he based his conclusions insufficient?[5] It must be remembered that it was DuPont that referred Pollard to Dr. Hill and required her to see Dr. Steinberg. Presumably, plaintiff would have been aware of the type of tests that had been done, and these, although in her favor, were found insufficient. DuPont did little to clarify what would be sufficient. Furthermore, several courts have recently questioned an administrator's absolutely requiring objective medical evidence, especially when the language of the plan in question does not explicitly require it or give the administrator explicit authority to ask for

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[5] Although not explained in the letter of denial, in its memorandum in support of its motion for summary judgment defendant points to a portion of Dr. Steinberg's report that indicates Pollard is manifesting symptoms of an established "personality and adjustment style, rather than an acute condition." It is unclear why defendant feels this is relevant. As noted throughout its memorandum in response to Pollard's claims that the cause of her condition was sexual harassment suffered in the workplace, defendant clearly states the cause of her condition is irrelevant under either plan. But for certain exceptions that are not applicable, plaintiff's eligibility for benefits is not dependent on the cause of her incapability to return to work as an Operator or her total and permanent inability to engage in gainful employment. Even if a determination on whether Pollard suffered from psychological problems or just a bad personality was relevant, other portions of the report point away from defendant's position, such as in the summary where Dr. Steinberg indicates that "[i]nefficiency and deterioration of psychological functioning has occurred over the past 14 years due to numerous types of stressors." Whatever the cause, Dr. Steinberg clearly states that Pollard's "return to work is not advised."

it. See Mitchell v. Eastman Kodak Co., 113 F.3d 433, 442-443 (3d Cir. 1997); Durr v. Metropolitan Life Ins. Co., 15 F. Supp.2d 205, 212 (D. Conn. 1998); Palmer v. University Med. Group, 994 F. Supp. 1221, 1233-34 (D. Oreg. 1998). See also Callahan, 941 F.2d at 460 (finding the most important determinant of whether an administrator's decision is arbitrary and capricious is the language of the plan itself as known to the employees or as they should have known it). Although it would not be arbitrary and capricious to require objective medical evidence in disability cases where such evidence is readily available, the court finds that when the illness is psychological and four separate professionals, three of whom were specialists in the area and two of whom were hired by the defendant find that plaintiff is unable to return to work, the requirement of additional objective medical evidence is arbitrary and capricious.

Defendant offers two justifications for the administrator's decision to deny benefits under the retirement plan. First, defendant argues that no objective medical evidence was submitted which showed any impairment of Pollard's cognitive or physical ability to function as an Operator. The court has already noted its concern with the requirement of objective medical evidence in this case, but even if defendant was legally entitled to require objective medical evidence it was only entitled to do so to determine whether provisions of the plan had been met. The plan provision in question focuses only on Pollard's ability to return to work as an Operator up to DuPont's standards. The court reads this as focusing on whether Pollard could return to work as an Operator at DuPont up to DuPont's standards, not on whether she was merely physically and cognitively capable of driving a truck or turning a valve. Even if she was fully functional in the cognitive and physical sense outside of the DuPont environment, such evidence is not relevant in this

case where Pollard is claiming she cannot use those cognitive and physical abilities at DuPont because of her psychological illness.[6] The overwhelming evidence in this case supports a finding that Pollard was not capable of returning to work as an Operator at DuPont.

Defendant's second justification is that Pollard failed to submit any evidence as to the permanency of her condition, as required by the plans. The court begins by noting that "permanent" cannot be defined here as requiring conclusive evidence that Pollard will never recover. Indeed, the court would take with a grain of salt the opinion of any doctor who conclusively stated that any patient, other than those in the most dire of circumstances, could never return to work. At the very least, changes in medical technology and the possibility of a positive response to new and varied treatments make it possible for future improvement. Thus, "permanent disability" should be defined as that which is expected to continue into the reasonable future as opposed to that which is temporary. See Lumbra v. United States, 290 U.S. 551, 560 (1934) (finding permanent disability "means that which is continuing as opposed to what is temporary" in the context

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[6] An example may help to clarify this statement. Assume an employee is severely allergic to a chemical found only in the DuPont workplace environment, such that the employee, who in all other respects is physically and psychologically normal, cannot function as an employee in the DuPont workplace. Should the court find the employee incapable of functioning as an employee up to DuPont standards, or should the court find, as defendant argues in this case, that because the employee is cognitively and physically capable of doing what is actually required by the job she is not disabled? The answer is obvious. The focus should be on whether Pollard can do the job at DuPont, not on whether she can physically and cognitively do the job.

of a war risk insurance policy); Crook v. Prudential Ins. Co., 139 F.2d 335, 339 (6th Cir. 1943) (finding under Kentucky law that the phrase "total and permanent disability" does not mean complete and continuing until death, but instead "imports continuance of the necessary degree of disability for an indefinite period of appreciable duration and not merely a transient or temporary incapacity"); Metropolitan Life Ins. Co. v. Noe, 31 S.W.2d 689, 690 (Tenn. 1930) (defining term "permanent disability" as "lasting or continuous as distinguishable from temporary merely with a promise or affording a probability of recovery"). Defendant focuses on various statements in the doctors' reports pertaining to Pollard's improvement, and argues that her improvement and capacity for continued improvement precludes the possibility that she is permanently disabled. The court disagrees. True, Dr. Brody and Dr. Hill stated that Pollard was showing signs of improvement. Dr. Farmer also indicated that Pollard's condition was treatable and that he would have expected more improvement during her treatment. These statements must be qualified in two respects. First, Dr. Hill changed her evaluation and explicitly stated that Pollard was "unable to return to work in any capacity." Second, the reported improvement appears to be at least in part due to Pollard's removal from the DuPont workplace. Dr. Brody stated that Pollard' s recovery was due in part to her escape from the DuPont workplace. Dr. Steinberg stated that a return to DuPont would bring about a "resurgence of symptom expression." Dr. Hill wrote that Pollard's condition and symptoms were a direct result of a trauma experienced in the workplace and that she would be unable to return to that workplace. Thus, the mere fact that Pollard either improved or was capable of improvement does not support defendant's position.

Defendant also argues that Pollard has failed to produce any objective medical evidence that her condition is permanent. As noted earlier, the rationality of this requirement must be determined in light of the facts of this case. Beyond what the court has already observed as problematic with this requirement, the court makes two additional notations. First, at least with respect to Dr. Steinberg and Dr. Farmer, these doctors were hired by DuPont to evaluate Pollard but were not told they should make a prognosis on her recovery. Thus, the court would not expect to see explicit mention that Pollard would not be able to return to work for the foreseeable future. Second, defendant reads the doctors' reports for what is not there rather than for what is there. For example, Dr. Steinberg states that Pollard's "return to work is not advised" and "is not recommended." Dr. Steinberg does not qualify these statements with "at this time" or "currently." Dr. Hill also writes that Pollard "is unable to return to her former workplace in any capacity." Dr. Hill also does not qualify her statements to reflect a temporary condition. The court need not address the statements of Dr. Brody and Dr. Farmer, but merely notes they also did not qualify their statements.

In summary, the court finds the administrator's denial of benefits under the retirement plan was arbitrary and capricious.

2. The Disability Plan

Based on the record, the court finds that the administrator's decision to deny benefits was rational in light of the disability plan's provisions. The disability plan states that an individual will be considered "totally and permanently disabled" if the administrator determines "that [the participant] is totally disabled by injuries or disease and

presumably will be totally and permanently prevented from pursuing any gainful occupation." (emphasis added).[7]

Without addressing all the evidence that has been previously recited, it is apparent that much of Pollard's illness stems from the DuPont workplace environment. Only Dr. Hill's last letter offers a modicum of support for the proposition that Pollard cannot maintain any gainful employment. Even there, Dr. Hill qualifies her statement as follows: "[i]n addition, it is my opinion that Ms. Pollard will be unable to engage in any work, particularly that which involves her coming into contact with people she does not know." Without offering examples, the court notes that there are several areas of work that would not require Pollard to come into contact with strangers.

In summary, although there is overwhelming evidence in the record that Pollard could not return to work at DuPont, there is little evidence in the record to suggest Pollard could not work elsewhere. Thus, the administrator's decision to deny benefits under the disability plan was not arbitrary and capricious.

V. Conclusion

For the foregoing reasons, both plaintiff's and defendant's motions for summary judgment will be treated as motions for judgment.

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[7] The court also notes that unlike the retirement plan, the disability plan explicitly gives the administrator great discretion in what constitutes acceptable medical evidence of disability.

Plaintiff's motion is denied with respect to her assertion that defendant's denial of benefits under the disability plan was arbitrary and capricious, but is granted with respect to her assertion that defendant's denial of benefits under the retirement plan was arbitrary and capricious. Correspondingly, defendant's motion is granted with respect to its assertion that its denial of benefits under the disability plan was not arbitrary and capricious, but is denied with respect to its assertion that defendant's denial of benefits under the retirement plan was not arbitrary and capricious.

The parties shall have ten days from the entry of this order to file briefs regarding what damages plaintiff is entitled to.

IT IS SO ORDERED this 30th day of March, 1999.

/s/_____
JEROME TURNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed May 24, 1999]

NO. 98-2147-TUA

SHARON B. POLLARD, *Plaintiff,*	)
v.	)
E.I. DUPONT DE NEMOURS CO., *Defendant.*	)

ORDER ON DAMAGES

In an order dated March 30, 1999, the court found defendant, E.I. DuPont De Nemours, Inc., liable to plaintiff, Sharon Pollard, for defendant's improper denial of benefits under an ERISA retirement plan.[1] Pursuant to that order, the court directed the parties to brief what damages plaintiff was entitled to.

The parties agree that under the terms of the plan at issue, plaintiff is entitled to a monthly incapability retirement

[1] Defendant originally denied benefits under both a disability and a retirement plan. The court upheld the denial of benefits under the disability plan, but found the denial of benefits under the retirement plan was arbitrary and capricious.

payment of $1,063.00, a monthly incapability supplement payment of $371.00; and a lump sum incapability retirement payment of $55,926.00 that represents monthly payments not made beginning with the date of eligibility through the court's March 30, 1999 order. The parties also agree that plaintiff is entitled to life, dental, and medical insurance benefits for life, and retroactive benefits for her out-of-pocket expenses that should have been covered beginning with her eligibility under the plan. The court sees no reason to disturb the parties' agreement with respect to the benefits plaintiff is entitled to under the plan. Accordingly, the court adopts the parties' agreement.

The parties do dispute whether plaintiff is entitled to several other types of damages, each of which is discussed below.

I. Prejudgment Interest

"Generally, the beneficiaries of pension plans have a right to prejudgment interest on benefits wrongly withheld." Wells v. U.S. Steel, 76 F.3d 731, 737 (6th Cir. 1996).

> Even assuming arguendo that the Trustee was acting prudently in withholding the pension funds . . . , it cannot be said that this did not confer a benefit on the trustee. Any additional time one gains, rightfully or wrongfully, in not having to submit payment of a sum of money owed another is without doubt a benefit. Moreover, the payee, plaintiff-appellant herein, has been deprived of the benefit of those payments. . . . To allow the Fund to retain the interest it earned on funds wrongfully withheld from a beneficiary would

> be to approve of an unjust enrichment. Further, the relief granted would fall short of making the beneficiary whole because he has been denied the use of money which was his.

Sweet v. Consolidated Aluminum Corp., 913 F.2d 268, 270 (6th Cir. 1990) (internal quotations and citation omitted). See also Tiemeyer v. Community Mut. Ins. Co., 8 F.3d 1094, 1102-03 (6th Cir. 1993). Although the trial court has discretion in awarding prejudgment interest, a trial court that exercises its discretion in favor of the fiduciary or trustee must enunciate why it chose that course in light of the general policy favoring the award of prejudgment interest. Id.

Defendant argues that an award of prejudgment interest is only appropriate when the trustee or fiduciary unduly delays the benefits a participant is entitled to. In light of the above-cited precedent, defendant's position is incorrect. See, e.g., Sweet, 8 F.3d at 1102 ("Awards of prejudgment interest are compensatory, not punitive, and a finding of wrongdoing by the defendant is not a prerequisite to such an award.") (quoting Drennan v. General Motors Corp., 977 F.2d 246, 253 (6th Cir. 1992)). Except as noted below, the court is aware of no reason, in light of the general policy favoring the award of prejudgment interest, why interest should not be awarded in this matter. Accordingly, the court awards plaintiff prejudgment interest.

The court finds that in order to make plaintiff whole, prejudgment interest should be calculated from the date plaintiff was paid benefits to which she was entitled. Snow v. Aetna Ins. Co., 998 F. Supp. 852, 855 (W.D. Tenn. 1998). Thus, interest should be calculated on each missed monthly payment from the date plaintiff would have received each monthly payment but for defendants's erroneous denial of

benefits. It appears that but for the denial of benefits, plaintiff would have received her first monthly payment on March 1, 1996. Thus, interest shall begin to run on that missed payment beginning March 1, 1996. Interest shall continue to run on that missed payment and on subsequent missed payments from the date of those missed payments until two months after plaintiff's administrative appeal was denied. The court finds that two months is a fair amount of time for plaintiff to have filed her civil suit. Any delay in filing suit after two months was the cause of plaintiff's lost interest until she actually filed her suit. At that point, interest will no longer accumulate on any benefits not paid until plaintiff filed suit. To illustrate, it appears that plaintiff's administrative appeal was denied on February 27, 1997, but that she did not file suit until February 18, 1998. Plaintiff should be entitled to interest on all monthly payments missed prior to April 27, 1997, calculated as stated above, through April 27, 1997. At that point defendant should no longer be charged for plaintiff's delay in filing suit. Interest shall again begin to accumulate on February 18, 1998, the date plaintiff filed suit.

Pursuant to its discretionary authority to set an appropriate interest rate, see Ford v. Uniroyal Pension Plan, 154 F.3d 613, 618-19 (6th Cir. 1998), the court sets a static rate at the last average fifty-two week United States Treasury bill rate published before defendant's initial denial of benefits. See id.

II. Postjudgment Interest

Although ERISA does not specifically address postjudgment interest, it does state that the Act is not intended to invalidate or supersede other federal law. 29 U.S.C. § 1144 (d). Thus, this court must award postjudgment interest pursuant to 28 U.S.C. § 1961, which provides that

"[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." See Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1031 (4th Cir. 1993) (finding award of postjudgment interest in ERISA case is mandatory). Accordingly, the court awards plaintiff postjudgment interest calculated in accordance with the framework of 28 U.S.C. § 1961. Postjudgment interest shall be calculated on the sum of the original award plus prejudgment interest. See Quesinberry, 987 F.2d at 1031-32.

III. Liquidated Damages

Plaintiff claims she is entitled to liquidated damages in the amount of twenty percent of unpaid contributions. It is unclear what unpaid contributions plaintiff is referring to. Plaintiff assets that such an award is mandatory under 29 U.S.C. § 1129 (b) (2), but that section does not pertain to either liquidated damages or unpaid contributions. It appears as though plaintiff may have confused 29 U.S.C. § 1129(b) (2) with 29 U.S.C. § 1129 (g) (2). Section 1129 (g) (2) provides for liquidated damages and unpaid contributions in a successful ERISA action brought by a fiduciary on behalf of an ERISA plan to enforce 29 U.S.C. § 1145, which deals with employers' obligations to make contributions to multiemployer plans. This is not such an action, and 29 U.S.C. § 1129 (g) (2) is unavailable to plaintiff. Accordingly, plaintiff's claim for liquidated damages is denied.

IV. Punitive Damages

It is unclear from plaintiff's complaint on which subsection of 29 U.S.C. §1132 she based her original claim. Nevertheless, the only subsections available to a participant seeking unpaid benefits under an ERISA plan are § 1132 (a)

(1) (B) or § 1132 (a) (3).[2] Punitive damages are not available to a plaintiff seeking relief under either subsection. Ford, 154 F.3d at 617-18. Accordingly, plaintiff's claim for punitive damages is denied.

V. Attorney's Fees

In determining whether attorneys' fees should be awarded in an ERISA benefits suit, a district court should consider:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4)

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[2] 29 U.S.C. § 1132 (a) provides, in relevant part, as follows.

A civil action may be brought --

(1) by a participant or beneficiary --

. . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

> whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Wells, 76 F.3d at 736 (quoting Sec. of Dept. of Labor v. King, 775 F.2d 666, 669 (6th Cir. 1985)). Applying this framework, the court finds plaintiff is not entitled to attorney's fees.

As to the first factor, there is no evidence to suggest defendant denied plaintiff benefits in bad faith. To the contrary, defendant submitted the affidavit of Steven Harrison, the Director of defendant's Corporate Compensation and Benefits Department and a member of the Board of Benefits and Pensions, who testified that defendant's denial of plaintiff's benefits was in accordance with defendant's long-standing interpretation of the plan. Defendant also submitted the affidavit of Benjamin Ramirez, the Board's medical delegate, who testified that defendant's decision was made on a good faith interpretation of the plan's provisions. Moreover, no evidence has been submitted to suggest that plaintiff was treated differently than any other claimant under the plan. Furthermore, the court notes that plaintiff brought suit challenging defendant's denial of benefits under two plans, and this court found only the denial of benefits under one of those plans to be arbitrary and capricious. In short, this factor weighs heavily in defendant's favor.

Defendant concedes that the second factor weighs in favor of plaintiff. However, this factor is not dispositive.

Foltice v. Guardsmen Products, Inc., 98 F.3d 933, 937 (6th Cir. 1996).

As noted by the Sixth Circuit, the third factor is more likely to weigh in plaintiff's favor when the defendant is highly culpable. Id. The court finds that defendant's decision to deny benefits in this case was most likely the product of an innocent procedural mistake. More specifically, it appears that defendant attempted to apply one standard for granting benefits under two different plans when those two plans set forth different eligibility criteria. This factor weighs in defendant's favor.

Plaintiff concedes that the fourth factor does not weigh in her favor.

The fifth factor is closer than the other four. Defendant's decision to deny benefits was based on plaintiff's failure to provide objective medical evidence of her inability to return to work. The court found this requirement was arbitrary and capricious because defendant's chosen medical consultants had stated that plaintiff could not return to work, even if they had not given explicit objective medical reasons to support their conclusions. Moreover, defendant was less than clear in what it required from plaintiff for eligibility, since at least one of defendant's chosen professionals had relied on objective medical evidence in determining plaintiff could not return to work. Nevertheless, as noted by the court in the earlier order, an administrator's requiring objective medical evidence of a condition is normally not arbitrary and capricious. Defendant was not out of bounds in arguing that its requiring objective medical evidence was not arbitrary and capricious here. Moreover, the court again notes that defendant successfully defended its decision under the

disability plan. In short, this factor does not favor either party to any great extent.

In summary, the first, third and fourth factors favor defendant. Only the second factor favors plaintiff, and that factor is never dispositive. Accordingly, plaintiff's request for attorney's fees is denied.

VI. Conclusion

For the foregoing reasons, plaintiff's request for prejudgment and postjudgment interest is granted. The parties shall jointly compute interest to be paid plaintiff in accordance with the directions in this order and file a joint statement regarding that amount within eleven days of the entry of this order.

Plaintiff's request for punitive damages, liquidated damages, and attorney's fees is denied.[3]

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[3] In a footnote, defendant argues it is inconsistent to award plaintiff pension benefits here when in her sexual harassment suit plaintiff was awarded damages based, at least in part, on her lost earnings capacity. The court notes that it does appear anomalous that plaintiff should receive both compensation for lost salary in her civil award and pension payments, as pensions are generally thought of as providing compensation in lieu of salary. However, without addressing the merits of defendant's argument or the appropriateness of defendant's first raising it at this stage of this proceeding, the court notes that the Sixth Circuit appears to have found this result reconcilable. See Hamlin v. Charter Township of Flint, 165 F.3d 426, 433-35 (6th Cir. 1999) (reconciling plaintiff's receipt of both pension payments and award under Title VII). The court need not rule on defendant's argument, however, because plaintiff's civil award in the sexual harassment case is currently on

IT IS SO ORDERED this 21st day of May, 1999.

/s/_____
JEROME TURNER
UNITED STATES DISTRICT JUDGE

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appeal to the Sixth Circuit. Whether plaintiff will ultimately receive an award for lost earning capacity, therefore, remains to be seen.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed August 20, 1998]

No. 95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Sharon Pollard, brought this suit against her former employer, alleging that she had been subjected to a hostile work environment because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). A non-jury trial was held in this matter on October 14, 15, 16, and 24, and November 3 and 4 of 1997. For the reasons set forth below, the Court finds that plaintiff was subjected to a hostile work environment because of her gender, in violation of Title VII, and judgment is ENTERED in favor of plaintiff.

FINDINGS OF FACT

Plaintiff began her employment with defendant in 1977 as a utility worker in the utility pool. She was promoted to

the position of assistant operator ("AO") in the oxone flouride area in 1978, and transferred to an AO position in the hydrogen peroxide area in 1979. In 1987, plaintiff was promoted to the position of operator in the hydrogen peroxide area. While plaintiff was working as an operator in peroxide, only one other woman was in an operator position in that area, and only two of the assistant operators were female. All of the other operators and assistant operators in the peroxide area were male.[1]

Plaintiff initially worked as an operator on "C" shift from 1987 to 1992. Each shift has three operators: the control room operator (or operator #1), operator #2, and operator #3. Each operator has separate duties on the shift, and none of the operators is superior in rank to the others. The control room operator works in the control room, the #2 operator works the south side of the area, and the #3 operator works in the laboratory and in the water building. The three AOs that are assigned to each shift take direction from the operators. While plaintiff was working as the control room operator on "C" shift, an incident occurred during which an AO, Rory Bricco, refused to take direction from plaintiff. Mr. Bricco informed plaintiff that he could not take direction from a woman, and placed a Bible on her desk, opened to a passage which read, "I do not permit a woman to teach or

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[1] Based on testimony at trial, the Court concludes that there are four different shifts ("A", "B", "C", and "D"), with approximately seven people on each shift. See Testimony of Mark Cobb ("Cobb's Test."), Trial Transcript ("Tr.") at 240. Accordingly, of the approximately twenty-eight employees on shifts in the peroxide area, only four were women.

have authority over a man. She must be silent."[2] Plaintiff subsequently transferred to a #2 operator position on "A" shift in 1992.

In 1994, plaintiff had moved from the #2 operator position to the #3 operator position on "A" shift in the peroxide area. The other members of her shift were Steve Carney, Jerry Lee, Joey Moody, David Walker, and Mark Cobb. Carney was the control room operator, Lee was the #2 operator, and Cobb, Moody, and Walker were the three AOs on the shift. The shift supervisor at that time was David Swartz.

During 1992 and 1993, plaintiff and all of the other members of "A" shift got along well. Many of the witnesses testified that they viewed the shift as their "extended family." Members of the shift would cook and eat their meals together

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[2] The Court notes that this event occurred outside of the relevant time period in this case, which is from December 1994 to December 1995, and thus cannot form a basis for liability on the part of defendant. Because allegations involving this same Bible verse are properly before the Court, however, this event is included as context, as the Court finds that the fact that plaintiff had been previously exposed to this Bible verse while working in the peroxide area contributed to the intensity of her reaction when she saw it for the second time.

in the break room,[3] and would talk to each other regularly about their lives outside of work.

In February of 1994, however, the congenial atmosphere on "A" shift began to change. At that time, DuPont announced that it would be taking part, for the first time, in the nationally recognized "Take Your Daughters to Work Day" ("TYDTWD") in April of that year. Plaintiff, as one of two female operators in the entire peroxide area, was asked to give a talk about her job to some of the girls coming to visit the plant on that day, and she agreed to do so. A number of the men on "A" shift, particularly Steve Carney and Jerry Lee, were against TYDTWD, and made their displeasure with DuPont's decision to take part in this event widely known. A number of other men in peroxide, and throughout the plant, were against DuPont's participation as well. See Testimony of Jerry Lee ("Lee's Test."), Tr. at 495. One of these men, Paul Lucas, sent an email out to everyone in the plant regarding TYDTWD, referring to the event as "horse malarky."

Plaintiff had discussions with both Steve Carney and Jerry Lee regarding her participation in TYDTWD, and both men made clear that they were against it. Testimony of Sharon Pollard ("Pollard's Test."), Tr. at 627-28. Subsequent to those discussions, the atmosphere on the shift

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[3] There were three separate eight hour shifts in the peroxide area: the 8:00 a.m. to 4:00 p.m. shift, the 4:00 p.m. to 12:00 midnight shift, and the 12:00 midnight to 8:00 a.m. shift. The employee break room included a small kitchen area with a stove, refrigerator, and microwave, and, particularly on the evening and midnight shifts, members of "A" shift would divide up cooking duties and take turns bringing in food to allow them to eat together.

began to change. All of the men on the shift, with the exception of Mark Cobb, stopped eating with plaintiff and stopped talking to her. Cobb testified that Carney instructed the other men on the shift not to eat with plaintiff, not to share food with her, not to be in the break room with her, and not to talk to her. Cobb's Test. at 251, 273. Plaintiff testified as follows:

> [I]f I came into the lunchroom, nobody would sit down at the table with me. If I sat down at a table that someone was already sitting at, they would get up and leave. . . . I heard a lot of under your breath kind of things . . . and snickering.

Pollard's Test., Tr. at 37. Cobb further stated that Carney instructed the other men on "A" shift not to follow any of plaintiff's instructions without checking with him first. Cobb's Test. at 251-52. Carney himself conceded that "[i]t's a possibility" that he told AOs on "A" shift to disregard plaintiff's instructions. Id. at 904.

It was common knowledge among the employees in the peroxide area that Steve Carney, Jerry Lee, Rory Bricco, and many of the other men in the area, did not approve of women working in peroxide. Cobb's Test., Tr. at 246-47, 251, 359, 361; Testimony of David Walker ("Walker's Test."), Tr. at 746-47. Mark Cobb testified that Carney would make comments to this effect approximately five times per week to the men on "A" shift, and Cobb and several other witnesses confirmed that Carney routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52.

Several witnesses testified that they had heard Carney use the word "heifer" to refer to women, and that use of the term "heifer" to refer to women in general was commonplace in the peroxide area. Testimony of Joey Moody ("Moody's Test."), Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723. Carney admitted that he referred to women as "heifers," and that he referred to plaintiff as a "bitch" and a "split tail." Testimony of Steve Carney ("Carney's Test."), Tr. at 908-09. In addition, DuPont had a company-sponsored support group known as the Women's Network,[4] of which Carney routinely expressed his disapproval. Cobb's Test., Tr. at 246-47; see also Testimony of Kay Jenks ("Jenks' Test."), Tr. at 416 (noting that the men on plaintiff's shift did not approve of plaintiff attending the meetings of the Women's Network).

In May of 1994, after plaintiff had been experiencing the kind of isolation described above from the members of "A" shift for approximately two months, the shift supervisor, David Swartz, held a training meeting.[5] During the meeting, all of the members of "A" shift and Swartz were seated around a small conference table. At some point during a break in the meeting, Carney and Walker were having a discussion about a girls softball team, during which Carney said "that heifer can't coach," in reference to the woman who coached the team. Moody's Test., Tr. at 697. Carney also said something along the lines of "women have no business coaching." Moody's Test., Tr. at 677-78; Walker's Test.,

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[4] Plaintiff regularly attended meetings of the Women's Network.

[5] This training meeting was not held to address the problems on the shift, rather it was a training session on work-related matters that was regularly held on Tuesdays.

Tr. at 753; Lee's Test., Tr. at 472-73; Pollard's Test., Tr, at 632. Plaintiff, who was sitting across the table from Carney, heard these comments, became very upset, and asked to be excused to go to the nurse's station. Pollard's Test., Tr. at 632-34.

Once she arrived at the nurse's station, plaintiff asked the nurse to call her supervisor, David Swartz, to come and speak with her. When Swartz arrived, plaintiff was very upset and began to cry. Swartz testified that she told him "that she couldn't take it any more, she was tired of people talking about women the way they do . . . [that Steve Carney had said] 'Well, that heifer can't coach,' . . . and she was just tired of them saying that women can't do anything." Testimony of David Swartz ("Swartz's Test."), Tr. at 949-50. Swartz further testified that he understood plaintiff's words to mean that "she couldn't take it any more about [the] men [in peroxide] degrading women." Id. at 979-80.

Swartz testified that he spoke with his supervisor, Alan Hubbell, about this incident, and that they decided that Swartz should speak to the men on the shift individually. Swartz's Test., Tr. at 952. With the exception of Walker, however, none of the men on the shift remembered Swartz speaking to them about this incident. Carney testified that Swartz spoke to him "a few times" about not communicating with plaintiff "right after [they] quit talking," but that Swartz soon gave up on trying to talk to him about it "because he knows I'm hardheaded . . . [and there] wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84.

Swartz testified that he could tell "there was tension on the shift" beginning in the spring of 1994, and that things did not improve during the rest of the year. Swartz's Test., Tr. at 954-55. He testified that many of the men talked to him

about the tension on the shift, and that plaintiff complained to him about the lack of communication and isolation on several occasions. Id. at 954, 956. When asked by counsel for DuPont what he, as the shift supervisor, tried to do to address the situation between spring of 1994 and December of 1994, Swartz responded:

> Well, I mean we continually talked to each individual. . . . I worked personally talking to each one of them hopefully [sic] that we could get back together, you know, as a more friendly group where it would relieve the tension, but it didn't seem to work.

Id. at 955.

During the spring and summer of 1994, plaintiff's situation worsened. The men on the shift still refused to eat with her or speak with her. She testified, and Mark Cobb corroborated, that on several occasions Carney would set off false alarms in her area, causing her to run around the peroxide area in search of a non-existent problem.[6] Pollard's Test., Tr. at 38; Cobb's Test., Tr. at 266-69. Cobb testified that Carney would brag to the other men on "A" shift about making plaintiff run all over plant to "show [] that he's in control." Cobb's Test., Tr. at 269. Cobb further testified that on two separate occasions after a false alarm had been pulled while plaintiff was cooking her dinner, one of the men would turn up the stove under her food, burning her dinner and rendering it inedible. Id. at 270-71. Cobb also stated that on several occasions, Carney would not call out actual

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[6] Several witnesses testified that the peroxide area was the size of three city blocks.

alarms from plaintiff's area.[7] Id. at 275. As a result, plaintiff would not respond to the problem, and it would appear to the #3 operator on the next shift that she was not doing her job. Id. at 275.

Part of plaintiff's job as the #3 operator was to monitor the vaporizers in the peroxide tanks, determine when they should be moved, and instruct the AOs to move them according to this schedule. Pollard's Test., Tr. at 32-33; Moody's Test., Tr. at 687. Plaintiff testified that, on several occasions, Carney told one of the AOs on "A" shift to remove the vaporizer from the tank earlier than plaintiff had planned for it to be removed, and then instructed them not to tell her that they had done so. Pollard's Test., Tr. at 32-33, 35. Plaintiff needed to sample the peroxide one hour after the vaporizer was removed. Id. at 90; Moody's Test. at 710. Accordingly, if the vaporizer was removed early, and plaintiff was not informed that it was removed, the resulting product could be too weak.[8] The fact that the peroxide was not timely

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[7] Based on the testimony during the trial, it appears that the control room operator sits in the control room of the peroxide area and monitors a series of instrument panels. If there is a problem, the control room operator will become aware of it via these instruments. The control room operator is then supposed to call out an alarm over the intercom system to the operator or AO working in the relevant area, so that the appropriate individual can go check on the problem.

[8] Various percentage strengths of peroxide were made at DuPont. Plaintiff testified that if a tank was off even 2%, e.g., a tank that was supposed to be 70% strength was 68% instead, it could not be brought back up to the proper percentage because the volume of chemicals that would have to be added would not fit into the already full tank. Pollard's Test., Tr. at 102-03.

sampled also created more work for the #3 operator on the next shift, and made it appear that plaintiff was not doing her job. Id. at 94-95. In addition, removing the vaporizer early could mean that not enough peroxide was made for the shipment out to DuPont's customers the next day, again making it appear as if plaintiff was not competently executing her job duties. Id. 89-90.

Plaintiff testified that the vaporizers were removed early approximately seven times during 1994 and 1995, with the most recent incident occurring during the week of July 5-11, 1995. After the first time that the problems with the vaporizers occurred, plaintiff spoke with David Walker and Joey Moody about it and asked them not to do it again. Id. at 98. Moody told her that he was following Carney's instructions. Id. Carney himself testified that he would sometimes tell one of the AOs to move a vaporizer, and that when he did so he did not believe that he had an obligation to tell plaintiff. Carney's Test., Tr. at 895.

Plaintiff testified that she spoke to her supervisor, David Swartz, about the vaporizer problem the second time it occurred, and every time after that. Swartz admitted that he spoke with plaintiff on several occasions during the spring and summer of 1994, and that she complained to him that "she wasn't getting communication – that Steve wasn't calling out alarms or he wouldn't say stuff to her when [vaporizers] were pulled or whatever because she had responsibility [for] sampling those tanks." Swartz's Test., Tr. at 957. Swartz testified that his only response to these complaints was the following:

> I [Swartz] would go to Steve and say "Steve, that's part of your job, you got to call out alarms." His response was, "I'm calling out

> the alarms, she's not answering it." So I was hearing it from both sides. And I would tell Sharon, "Steve's saying you're not responding to it." And she would say that she was, and so we had to get that communication link straightened out, and I thought that eventually that worked out. . . .

Id. 957. The evidence in the record, however, demonstrates that the problem was not solved, and that Swartz never investigated plaintiff's complaints further.

During the summer of 1994, plaintiff came to work one day and found that both of the tires on her bicycle had been slit open.[9] Swartz admitted that the day that plaintiff discovered that the tires had been cut, she reported it to him and told him that she suspected that Carney was responsible. Swartz's Test., Tr. at 959. In response to this complaint, Swartz spoke with Carney, and Carney denied cutting plaintiff's tires. Id. Again, after Carney denied the allegations, Swartz did nothing else to investigate plaintiff's complaints. Swartz stated, "I didn't have any other facts to go on that would say that he did it." Id. 959-60. Accordingly, rather than investigate further, Swartz did nothing.

In December of 1994, after these problems had been occurring for ten months with no improvement, Mark Cobb and David Walker approached David Swartz and asked him

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[9] Because the DuPont plant is so large, employees often ride bicycles from the front gate to their area.

to call a meeting with the entire shift to discuss the situation.[10] Accordingly, a meeting was held in late December of 1994 that came to be known as the "first healing meeting." On the date that the meeting was to be held, Carney was on vacation. The members of the shift discussed whether or not they should proceed with the meeting without him, and decided to go ahead.

At this meeting, Walker and Moody told plaintiff that Carney had encouraged them not to talk to her. Pollard's Test., Tr. at 46. Walker and Moody also told plaintiff that Carney had told them that she was "keeping a book on them" in which she wrote down everything they said to use it against them. Id. Plaintiff assured them that she was not keeping a book, and then explained to them how stressful the isolation was for her, and how she "had to run around and do more steps than [she] would normally do to get [her] job done . . . because [she] wasn't getting communicated with." Id. at 47. Plaintiff also explained to them that the lack of communication was dangerous because a spill or explosion could result, and that it could also cause a shipment to a customer to be missed. Id. at 51. David Swartz was present throughout this meeting and, again, heard all of plaintiff's complaints.

When Carney returned from vacation and learned that "A" shift had held a meeting without him he was furious, and demanded that another meeting be held. Pollard's Test., Tr. at 51; Cobb's Test., Tr. 285-86; Moody's Test., Tr. at 684; Swartz's Test., Tr. at 961. During the second meeting, the

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[10] The Court notes that even after all of the complaints that Swartz had received during the past ten months from plaintiff, the idea to call a meeting to discuss the situation was not his.

entire shift, including Swartz, was present. Plaintiff reiterated all of her concerns about the lack of communication and other problems. Plaintiff also mentioned that her bike tires had been slashed, and another incident that summer in which she believed that Carney had tried to run her off the road in his truck as she left the DuPont plant.[11] Moody's Test., Tr. at 685; Walker's Test., Tr. at 738. At the second meeting, Carney "got in [plaintiff's] face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." Pollard's Test., Tr. at 52; Moody's Test., Tr. at 684-85; Cobb's Test., Tr. at 289-90. Plaintiff then turned to Swartz, who was observing this interaction, and asked him if he was going to permit Carney to speak to her in that manner. Cobb's Test., Tr. at 290-91; Pollard's Test., Tr. at 52; Swartz's Test., Tr. at 993. Swartz then said "I think that's enough," and the meeting ended with no further resolution of the issues. Id.

Subsequent to these meetings, the situation did not improve. Swartz was aware that the hostility and tension on the shift had not abated, and plaintiff continued to complain to him that the environment was intolerable for her. Swartz's Test. at 964. Swartz, however, took no action to help her. During this time period, plaintiff attended several meetings of the Women's Network and spoke to the group about the problems she was facing, the isolation she was experiencing, and the psychological effect it was having on her. Jenks' Test., Tr. at 415-17. Kay Jenks, a female engineer and one of the leaders of the Woman's Network, testified that during the Network meetings plaintiff:

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[11] Swartz concedes that he never did anything to investigate plaintiff's allegation that Carney tried to run her off the road. Swartz's Test., Tr. at 1004.

> was concerned that she would be out there on nights, frequently the only woman on shift, she would go for hours without even hearing another voice. . . . She was concerned that something would happen that would endanger her and they would not tell her, they would not get ahold of her, she was also concerned that maybe something would go wrong in the process that she could help fix or impact, but they wouldn't let her know in time and then it would reflect poorly on her performance.

Id. at 417.

In attendance at some of these meetings was Beth Basham, unit supervisor for the peroxide area.[12] Basham conceded that she heard plaintiff talk about the problems she was having with the men in peroxide on several occasions. Basham's Test., Tr. at 1184, 1194-95. Basham further testified that she "knew there was a real problem in the peroxide area of the male workers accepting the role of a female in that area," and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Id. at 1195, 1217. In spite of this knowledge, however, Basham never investigated the situation based on what she had learned at the Women's Network

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[12] Basham was the supervisor of Alan Hubbell, who was David Swartz's supervisor. Basham was the "number one person in the peroxide area," and reported directly to the plant manager, Gary Lewis. Testimony of Beth Basham ("Basham's Test."), Tr. at 1181-82.

meetings.[13] Basham testified that she never wrote a report or sent a memorandum to anyone in upper management at DuPont stating that there was a real problem in the peroxide area regarding the treatment of female employees, and she "could not recall" if she ever discussed the situation with anyone at DuPont's headquarters informally. Id. at 1197-98.

On May 25, 1995, the Women's Network hosted a meeting at which Bernie Scales, a specialist in diversity training from DuPont's headquarters, spoke to the Network. At that meeting, plaintiff began to talk about the isolation and harassment she was receiving from the men in peroxide, and asked to speak to Scales further at the conclusion of the meeting. After the meeting was over, Scales met with plaintiff. At that meeting plaintiff told Scales all about the long-term harassment and isolation she had been experiencing. As a result of that meeting, Scales spoke to the plant manager Gary Lewis, who then spoke to Bob Shaw, employee relations manager for the Memphis DuPont plant.

On May 28, 1995, Shaw, Lee Ann Rice,[14] and Gary Fish[15] met with plaintiff to discuss her situation. During the course of that meeting, plaintiff recounted the full history of the harassment she had experienced in the peroxide area,

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[13] Basham did become involved in the investigation that took place during the summer of 1995, but, prior to that, did nothing to formally investigate plaintiff's charges of harassment, despite learning of them in the context of the Women's Network meetings.

[14] Rice is a manager in Human Resources. Her supervisor is Bob Shaw.

[15] Fish was a plant shift supervisor.

including the allegation that Carney had tried to run her off the road the previous summer, and told them that she wanted this situation corrected. Testimony of Bob Shaw ("Shaw's Test."), Tr. at 1094; Testimony of Lee Ann Rice ("Rice's Test."), Tr. at 401; Pollard's Test., Tr. at 62. Subsequent to that meeting, Shaw and Swartz spoke to Carney about his behavior. Swartz's Test., Tr. at 968. Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04. In addition, neither Shaw, nor anyone else at Dupont, ever investigated plaintiff's allegation that Carney had tried to run her off the road, after Shaw spoke to Carney and Carney denied that it had occurred. Shaw's Test., Tr. at 1102. Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations. Basham's Test., Tr. at 1250-51.

After Shaw spoke to Carney, Carney's behavior improved for about four weeks. During the week of July 5-11, 1995, however, Carney returned to his prior patterns of behavior. Pollard's Test., Tr. at 107. Another incident in which the vaporizer was taken out early without plaintiff's knowledge also occurred during this week. Id. at 89. Plaintiff went to David Swartz and begged him to "just get me off this shift, nothing's changed and I can't take it." Id. at 107. Rather than investigating the situation or moving Carney to another shift, Swartz spoke to plaintiff the next day and informed her that a control room operator position on another shift was available. Id. at 108; Swartz's Test., Tr. at 994-96. Plaintiff did not want to take this position because it was on the same shift with Rory Bricco, the man who had refused to take direction from her when she was a control room operator

on "C" shift. Plaintiff told Swartz she would not bid for that position. Pollard's Test., Tr. at 108-09.

On July 28, 1995, plaintiff discovered a highlighted copy of the same Bible verse that Bricco had put on her desk when he refused to take direction from her in her mailbox at work. As noted above, that Bible verse read: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Tr. at 407 (quoting 1 Timothy 2:11). When plaintiff discovered the Bible verse, she described her reaction as follows:

> I felt like I had been hit with a brick, I just couldn't believe that after all that had been talked about, they were asking me to go back into the control room . . . and I just considered [that] this was the men's answer to that.

Pollard's Test., Tr. at 110.

Subsequent to that event, plaintiff never returned to work at DuPont. A committee was formed to investigate the Bible verse incident. As with the other "investigations" that DuPont had initiated with regard to plaintiff's complaints, this one was wretchedly inadequate. The investigation consisted of asking an identical series of typed questions to each of the men on "A" shift individually, and to the other men in the peroxide area in groups. Shaw's Test., Tr. at 1106. All of the questions were answerable with a simple yes or no, and when all of the men denied having any knowledge of the incident, DuPont proceeded no further with the investigation. Shaw's Test., Tr. at 1268, 1270. No one from DuPont management ever questioned Steve Carney about whether he

was involved in the Bible verse incident. Carney's Test., Tr. at 931.

After plaintiff left "A" shift, a party was held to celebrate her departure. Cobb's Test., Tr. at 277-79; Carney's Test., Tr. at 931-32. Steve Carney fried catfish and crappie that he had brought in, and the other men blew up balloons and taped them to the ceiling. Id. Mark Cobb testified that at the party Carney declared, "glad the bitch is gone, glad the bitch is not coming back." Cobb's Test., Tr. at 278. Carney himself testified as follows:

> Q: Now, after she [plaintiff] left, there was a party in the peroxide are, wasn't there?
> A: Yes, ma'am.
> Q: And you participated in that party, correct?
> A: Yes, ma'am.
> Q: And there were balloons at that party, correct?
> A: Yes, ma'am.
> Q: And I believe there was crappie cooked, correct?
> A: Yes, ma'am.
> Q: And you do recall that, don't you?
> A: Yes, ma'am.
> Q: You were celebrating the departure of Sharon Pollard, weren't you?
> A: Yes, ma'am.

Carney's Test., Tr. at 931-32.

Plaintiff was on short-term disability leave for the next six months, during which time she saw a number of psychologists and psychiatrists that DuPont required her to visit. In particular, DuPont sent plaintiff to Dr. Fred

Steinberg, who concluded she could not return to work. In spite of this opinion, however, DuPont scheduled a "return to work" meeting with plaintiff in February of 1996. At that meeting DuPont management would not guarantee that plaintiff would not be put back on a shift with Carney. Pollard's Test., Tr. at 219. Plaintiff told them that she could not return to work under those conditions, and DuPont terminated her, effective February 29, 1996. Id. at 154, 217-19.

CONCLUSIONS OF LAW

Title VII prohibits discrimination "against any individual with respect to [her] compensation, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) . In Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment. As noted by the Sixth Circuit in Black v. Zaring Homes, Inc., 104 F.3d 822, 825 (6th Cir. 1997), the statute grants employees "the right to be work in an environment free from discriminatory intimidation, ridicule, and insult." 104 F.3d at 825 (quoting Meritor, 477 U.S. at 65).

In order to succeed on a hostile work environment claim, a plaintiff must prove the following elements: 1) the plaintiff is a member of a protected class; 2) the plaintiff was subject to unwelcomed sexual harassment; 3) the harassment complained of was based on sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive work environment; and 5) the employer knew, or should have known, of the charged sexual

harassment, and failed to take prompt and appropriate corrective action. Fleenor v. Hewitt Soap Co., 81 F.3d 48, 49 (6th Cir. 1996).

There is no question that plaintiff satisfies the first two elements as required by Fleenor. First, as a woman, plaintiff is a member of a protected class. Second, it is clear from plaintiff's repeated complaints, initially to her supervisor David Swartz and later to other members of DuPont management, including Shaw, Rice, Scales, and Basham, that the harassment plaintiff was experiencing was unwelcome.[16]

With regard to the third element of the Fleenor test, the Court concludes that plaintiff has unequivocally established that the harassment she experienced was based on her gender. As recently clarified by the Supreme Court in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998), harassment based on gender need not be sexual in nature:

> Harassing conduct need not be motivated by sexual desire to support an inference of discrimination based on sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.

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[16] Moreover, plaintiff's repeated complaints during the Women's Network meetings, and to the other members of "A" shift during the two "healing" meetings held in December 1994, further support the Court's conclusion that the harassment was unwelcome.

Oncale, 118 S. Ct. at 1002 (emphasis added).

As noted above, the record is replete with evidence that several of the men in the peroxide area were "motivated by general hostility to women in the workplace," and felt strongly that women did not belong in the peroxide area. Cobb's Test., Tr. at 246-47, 251, 359, 361; Walker's Test., Tr. at 746-47; Basham's Test., Tr. at 1195. Specifically as to plaintiff's shift, Steve Carney stated that women didn't belong there approximately five times per week, and routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52. Use of the term "heifer" to refer to women was commonplace behavior by men in the peroxide area. Moody's Test., Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723.

Carney himself testified that he referred to women as "heifers" and that he referred to plaintiff as a "bitch" and a "split tail."[17] Carney's Test., Tr. 908-09. Carney, and the other men on "A" shift, repeatedly voiced their objections to the Women's Network and to DuPont's participation in "Take Your Daughters to Work Day." Even Beth Basham, DuPont's unit supervisor of the peroxide area, conceded that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Basham's Test., Tr. at 1217. Finally, the content of the Bible verse placed in plaintiff's mailbox on July 28, 1995, leaves absolutely no doubt in the Court's mind that the harassment of plaintiff was based on her gender.

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[17] The Court notes that several witnesses testified that they considered Carney to be a "leader." Walker's Test., Tr. at 757; Swartz's Test., Tr. at 992.

As to the question of whether the harassment was pervasive enough to constitute a hostile work environment and unreasonably interfere with plaintiff's work performance, the Supreme Court reaffirmed the standard set forth in Meritor, and further clarified it in Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). In Harris, the Court explained that the conduct must be judged by both an objective and subjective standard. 510 U.S. at 21-22. Accordingly, "the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." Black, 104 F.3d at 826 (citing Harris, 510 U.S. at 21-22.) "This standard...takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." Harris, 510 U.S. at 21.

The Supreme Court acknowledged that this approach is not susceptible to a "mathematically precise test," id. at 22, but sought to provide some guidance with regard to the determination of whether a work environment was objectively hostile or abusive. The Court explained that all of the circumstances should be considered, and offered a non-exhaustive list of relevant factors, including:

> The frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it- unreasonably interferes with an employee's performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while

> psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 23.

Based on the evidence set forth above, the Court concludes that harassment faced by plaintiff while she was on the "A" shift at DuPont, and specifically during the December 1994 through December of 1995 period relevant to liability in this case, constituted a pervasively hostile environment and unreasonably interfered with her work performance. The false alarms, failure to communicate alarms and other information necessary for plaintiff's job, and the early removal of the vaporizers at Carney's instruction on several occasions, are examples of direct interference with plaintiff's execution of her job duties. This kind of deliberate tampering with plaintiff's area of responsibility could have, and very well may have, resulted in safety risks or production shortages, and made plaintiff appear incompetent to the # 3 operator on the next shift.

Moreover, as Justice Ginsburg noted in her concurring opinion in Harris, to show unreasonable interference with a plaintiff's work performance, "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'" 510 U.S. 17, 25, 114 S. Ct. 367, 126 L. Ed. 2d 295 (Ginsburg, J., concurring)(quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988). The Court finds that plaintiff has demonstrated that the harassment so altered her working

conditions as to make it more difficult to do her job, on both an objective and subjective level.

Plaintiff testified that she suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness. A psychologist and a psychiatrist who saw plaintiff both concluded that she suffered from post-traumatic stress disorder. See Testimony of Dr. Janet Hill, Tr. 775-851; Testimony of Dr. Richard Farmer, Tr. 502-79. Several witnesses testified about the dramatic change in plaintiff's personality during this time period. Jenks' Test., Tr. at 418; Testimony of Charlotte Blaylock, Tr. at 442-44; Testimony of John Pollard, Tr. at 451-52.

Plaintiff testified extensively about the enormous psychological effect the long-term campaign of harassment, intimidation, and isolation executed by the men on "A" shift had on her mental and emotional state. Plaintiff stated that the last straw in the long ordeal, the placing of the Bible verse in her mailbox at work, so upset her and interfered with her ability to perform her job that she left her position at the plant where she had worked for the past seventeen years and did not return. Accordingly, the Court concludes that plaintiff has satisfied the fourth requirement necessary for a hostile environment claim, in that she has demonstrated that the harassment "unreasonably interfered with [her] work performance and created an intimidating, hostile, [and] offensive working environment." Fleenor v. Hewitt Soap Co., 81 F.3d 48, 49 (6th Cir. 1996).

Finally, the Court must consider whether DuPont knew, or should have known, of the charged sexual harassment and failed to take prompt and appropriate corrective action. The evidence on this point is overwhelming. As set forth above, beginning in the spring of

1994, plaintiff complained about the lack of communication, constant disparaging remarks about women, and the sabotage of her work by the men on her shift to her supervisor, David Swartz.

Time and time again, after receiving these complaints from plaintiff,[18] Swartz either made a half-hearted attempt to speak to Carney, which ended as soon as Carney denied the conduct, or did nothing at all. Carney testified that after a few attempts, Swartz quit talking to him because he was "hard-headed" and Swartz knew "there wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84. Swartz himself conceded that his efforts to remedy the situation "didn't seem to work." Swartz's Test., Tr. at 955. However, Swartz took no further steps to end the campaign of harassment being waged against plaintiff by the men on "A" shift.

Swartz testified that, at least after the softball coach incident in May of 1994, he spoke to his supervisor Alan Hubbell about the situation in peroxide. Swartz's Test., Tr. at 952. In spite of the fact that the situation did not improve, Hubbell never followed-up on the situation or initiated any

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[18] The Court notes that the testimony of both plaintiff and Swartz reveals that plaintiff discussed her situation with Swartz throughout the latter half of 1994 and in 1995. As to specific instances, however, the record reveals that Swartz was on notice of plaintiff's complaints in May of 1994 after Carney's comment that "women had no business coaching" at the training meeting, during the summer of 1994 when plaintiff complained to Swartz the day after her bicycle tires were cut, and in December 1994 when Swartz was present at the two "healing meetings" at which plaintiff set forth all of her complaints and concerns. Swartz's Test., Tr. at 949-50, 979-80, 958, 959-60, 993.

kind of formal investigation. Beth Basham, the highest-ranked supervisor in the peroxide area, testified that she was on notice of the harassment plaintiff was experiencing based on her attendance at Women's Network meeting at which plaintiff spoke about her situation. Basham, Tr. at 1184, 1194-95. Just as with Swartz, however, Basham did nothing to investigate the situation or discipline the individuals involved. After Bob Shaw, employee relations manager for the Memphis plant, became aware that this harassment had been ongoing since 1994, Shaw spoke to Carney about it, but never formally disciplined him in any way. Bernie Scales, from DuPont headquarters, was aware of the situation based on plaintiff's meeting with him on May 25, 1995. However, no one from DuPont's headquarters ever visited the Memphis plant to follow-up on plaintiff's situation or conduct an investigation of her allegations.

Several witnesses testified that DuPont has a progressive disciplinary system in which employees are to receive increasingly severe sanctions if the misconduct at issue does not cease. Sanctions in this system range from an informal oral reprimand to termination. In spite of all of the complaints plaintiff made against him, and the fact that the situation did not improve, Steve Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04.

This situation was reprehensible. This is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched. Plaintiff repeatedly complained to DuPont management to no avail. Accordingly, the Court concludes, without reservation,

that DuPont knew of the charged sexual harassment and utterly failed to take prompt and appropriate corrective action.

Plaintiff has, therefore, satisfied each of the elements necessary to prove that she was subjected to a hostile work environment based on her gender in violation of Title VII, and judgment is ENTERED in favor of plaintiff as follows:

1. Defendant is ORDERED to pay plaintiff $ 107,364.00 in back pay and accrued benefits;

2. Defendant is ORDERED to pay plaintiff $ 300,000.00 in compensatory damages,[19] in accordance with the

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[19] The amount of compensatory damages includes front pay, pursuant to the Sixth Circuit's holding in Hudson v. Reno, 130 F.3d 1193, 1204 (6th Cir. 1997) ("We conclude that front pay is subject to the caps on future pecuniary losses as provided in § 1981a(b)(3) because front pay is a 'future pecuniary loss.'") The Court notes that the $ 300,000.00 award is, in fact, insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement. The Court is bound by the statutory cap set forth in § 1981a however, and cannot award plaintiff compensatory damages in excess of that cap.

Because the amount of compensatory damages awarded by the Court is $ 300,000.00, the Court is thus prohibited by the statutory cap from awarding plaintiff any punitive damages. See 42 U.S.C. § 1981a(b)(3) ("The sum of the amount of compensatory damages awarded...and the amount of punitive damages awarded . . .shall not exceed . . . $ 300,000.00"). For the record, however, the Court finds that punitive damages are justified in this case, as defendant has "engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual," 42 U.S.C. § 1981a(b)(1), and, absent the

statutory cap set forth in 42 U.S.C. § 1981a(b)(3); and

3. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

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statutory cap, the Court would have awarded punitive damages based upon DuPont's repeated failure to remedy this egregious situation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed August 20, 1998]

No.95-3010 M1/V

SHARON B. POLLARD,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS, INC.,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that, in accordance with the Memorandum Opinion and Order, filed August 20, 1998, judgment is ENTERED in favor of plaintiff as follows:

a. Defendant is ORDERED to pay plaintiff $107,364.00 in back pay and accrued benefits;

b. Defendant is ORDERED to pay plaintiff $300,000.00 in compensatory damages, in accordance with the statutory cap set forth in 42 U.S.C. § 198la(b) (3); and

c. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 8/20/98.

APPROVED:

/s/_____
JON PHIPPS MCCALLA
UNITED STATES DISTRICT COURT

August 20, 1998
Date

/s/_____
ROBERT R. DI TROLIO
Clerk of Court

_____
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 26, 2000]

Nos. 98-6317 / 6319; 99-5125

Sharon B. Pollard,	)
Plaintiff-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
E. I. DuPont de Nemours	)
Company,	)
Defendant-Appellant/	)
Cross-Appellee.	)
	)

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 95-3010--Jon Phipps McCalla, District Judge.

Before: MERRITT, CLAY, and CUDAHY,* Circuit Judges.

OPINION

MERRITT, Circuit Judge. Sharon Pollard and her husband brought this action against her employer, DuPont, for "continuing harassment based on her sex since 1987"

* The Honorable Richard D. Cudahy, Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

under Title VII, as well as the common law injuries of intentional infliction of emotional distress, negligent supervision, and loss of consortium. The district court found that she was subjected to co-worker hostile work environment sexual harassment, that her DuPont supervisors were well aware of the discrimination, and that it resulted in a medical leave of absence from her job for psychological assistance and her eventual dismissal for refusing to return to the same hostile environment. We agree with the district court that the record demonstrates that DuPont employees engaged in flagrant discrimination based on gender and that DuPont managers and supervisors did not take adequate steps to stop it.

The claim of sexual harassment was tried before the court instead of a jury. Judge McCalla was so persuaded by Pollard's claim that in his order he concluded that "[t]his is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched." The court awarded Pollard $107,364 in back pay and benefits, $300,000 in compensatory damages, the maximum permitted by the statutory cap, and attorney's fees in the amount of $252,997.38. DuPont now appeals the court's decisions, arguing 1) that there was no harassment or discrimination based on gender and that the trial court's factual finding that DuPont had actual knowledge of and responded indifferently to Pollard's harassment was clearly erroneous, 2) that the denial of judgment as a matter of law was improper because Pollard's claim was one of retaliation, not harassment, 3) that Pollard's harassment claim failed because she failed to show disparate treatment, 4) that judicial bias, hostility, and predetermination of facts precluded DuPont's receipt of a fair trial, and 5) that the award of attorney's fees to plaintiff was unreasonable.

Pollard cross-appeals on the bases that 1) front pay should not be subject to limitations on damages under § 1981a, 2) the statutory cap on compensatory damages is unconstitutional because it violates the doctrine of separation of powers and the Equal Protection Clause, and 3) the district court erred in granting summary judgment on Pollard's claim of intentional infliction of emotional distress.

I. Facts

The district court's findings of fact are summarized as follows: Pollard began working for DuPont in 1977. In 1978 she was promoted to "assistant operator," and she was transferred to the hydrogen peroxide area of the plant in 1979. Of the approximately 28 employees in peroxide, four were women. Pollard was promoted to operator in 1987, and worked on "C" shift as one of the three operators on that shift until 1992. On each shift, operator #1 is the control room operator, and operators #2 and #3 work in other areas of peroxide manufacture, keeping the pipes, valves and other machinery operating. Each operator's duties are different and none is superior in rank to the others. While Pollard was working on "C" shift, one of the assistant operators named Rory Brico refused to take direction from plaintiff because she was a woman. He placed a Bible on her desk open to the passage "I do not permit a woman to teach or have authority over man. She must be silent."

After that incident, plaintiff was transferred and became the #3 operator on "A" shift in 1992. The other operators on her shift were Steve Carney, the control room operator, and Jerry Lee, and the assistant operators were named Moody, Walker, and Cobb. The shift supervisor was David Swartz. During 1992 and 1993, the members of "A" shift got along without incident. In February 1994 the

atmosphere abruptly changed. DuPont announced that it was going to participate in national Take Your Daughters to Work Day in April 1994, and Pollard was asked to give a talk to a group of girls coming to visit the plant. Some of the men on "A" shift, particularly Steve Carney and Jerry Lee, loudly complained about DuPont's participation in the program. A number of other men in peroxide were also against it, and they circulated an email entitled "Bull Malarky" to everyone in the plant discussing their displeasure with the program.

After plaintiff had discussions with both Steve Carney and Jerry Lee about Take Your Daughters to Work Day in early 1994, all of the men on the shift (with the exception of Mark Cobb, an assistant operator), stopped talking to plaintiff. Cobb's testimony, which was basically undisputed, indicated that Steve Carney, the control room operator, instructed all of the men on "A" shift to not eat with her, share food with her, be in the break room with her, or talk to her, and that Carney instructed the men not to follow any of Pollard's instructions without consulting with him first. Carney admitted in his testimony that "it was a possibility" that he had told the other men to disregard Pollard's directions.

It was common knowledge in the peroxide area that many of the men including Carney, Jerry Lee, and Rory Brico (of the Bible verse incident) did not approve of women working in the peroxide department. Testimony proved that Carney made remarks to this effect approximately five times per week, consistently, and that Carney routinely referred to women as "bitches," "cunts," "heifers," and "split tails." This language was commonly used by several men in peroxide, and Carney admitted that he used the terms to refer to women in general and to plaintiff in particular. In addition, DuPont had a company-sponsor support group called the

Women's Network which the men vocally disapproved of Pollard attending. Plaintiff worked in this hostile environment for the next year and half.

In May 1994, after about two months of this treatment, David Swartz, the shift supervisor, held a training meeting. During a break in the meeting, Carney and Walker were having a discussion about a girl's softball team during which Carney said "that heifer can't coach" and "women have no business coaching" in reference to the woman who coached the team. Plaintiff was seated across the table, became upset, and asked to leave the meeting. She went to the nurse's station and asked the nurse to call David Swartz. When Swartz arrived, Pollard told Swartz that she could not take it anymore and that she was tired of the men always saying women couldn't do anything and degrading women. Swartz spoke with his supervisor about the incident, and they decided that Swartz should speak with the men individually about it. With the exception of Walker, none of the men on the shift remembered Swartz speaking with them about it. Carney testified that Swartz did approach him about not communicating with plaintiff immediately after the tension started in February, but that Swartz gave up on trying to talk to him about it because, according to Carney, "he knows I'm hardheaded . . . [and there] wasn't no sense in saying anything else." In other words, Carney made it plain he was not going to change his behavior.

Swartz testified that he knew there was tension on the shift beginning in the spring of 1994 and that it did not improve for the rest of the year. He specifically testified that plaintiff complained to him about the lack of communication and isolation and other gender-based conduct on several occasions. The situation worsened in the summer of 1994. Plaintiff and Mark Cobb testified that Carney would go so far

as to set off false alarms in plaintiff's area, causing her to run around the peroxide area in search of a non-existent problem. Cobb testified that Carney bragged to the other men that this was his way of showing that he, a man, was in control. If a false alarm was set while Pollard was on break cooking her dinner, the men would turn up the stove to burn her food while she was searching for the problem. In addition, Cobb testified that there were numerous incidents during which Carney would not tell plaintiff about actual alarms in her area. Plaintiff would therefore not respond to the problem, and it would appear to the operator on the next shift that she was not doing her job.

Plaintiff's job duties included monitoring the vaporizers in the peroxide tanks and determining when they should be moved. She was to sample the peroxide in a tank one hour after it was moved, and any delay would result in a weak product. Carney admitted instructing the assistant operators on several occasions to remove the vaporizers from the tanks earlier than plaintiff instructed without telling her. Again, this made it appear to the operator on the next shift that plaintiff was not doing her job, and additionally it affected whether customers would receive their shipments on time. This happened approximately seven times in 1994 and 1995, according to Pollard, with the last incident occurring in July 1995. After the first incident she spoke to the assistant operators about it, and they informed her that they were following Carney's instructions. After the second incident, Pollard spoke with Swartz about the problem. Pollard discussed these ongoing communication problems with Swartz on numerous occasions. Swartz would tell Carney that he must call out the alarms and communicate with plaintiff, but Carney would tell Swartz that he was doing his job, and that Pollard was simply not doing her job. Swartz did not

investigate further or discipline Carney. Carney was never suspended or fired for this behavior.

During the summer of 1994 plaintiff found the tires on the bicycle she rode from the gate to her section of the plant had been slashed. That day, Pollard complained to Swartz that she suspected Carney had done it. Swartz spoke with Carney, and he denied having done it. Swartz did not investigate further.

In December 1994, two of the assistant operators, Mark Cobb and David Walker, approached Swartz and asked him to call a meeting to discuss the treatment of Pollard by Carney and the other men. Swartz scheduled a meeting which they called the "first healing meeting." Carney was on vacation the day of the meeting. At the meeting, Walker and Moody told Pollard that Carney told them not to talk to her or communicate with her, and that Carney told them that Pollard was "keeping a book on them." Pollard told them that she was not doing so, and stressed the importance of communicating with her in order for her to do her job and to avoid possible dangerous consequences. David Swartz was present and heard all of plaintiffs complaint's at this meeting.

Carney returned from vacation and was angry that a meeting had been held without him. He demanded a second meeting. During that meeting, plaintiff reiterated her concerns about the lack of communication and other problems. Plaintiff also mentioned her bicycle tire slashing, and told the group of another incident in which she believed Carney tried to run her off the road as she left the plant. Carney "got in plaintiff's face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." When plaintiff asked Swartz if he was going to allow Carney to talk to her that way, Swartz said "I think that's enough"

and ended the meeting. Nothing happened to change the situation.

The tension continued, and plaintiff continued to complain, both to Swartz and in her Women's Network meetings. Pollard told the group she was afraid for her safety and was concerned that a dangerous situation might arise in the peroxide area of which the men would not inform her. Beth Basham, David Swartz's supervisor, attended these meetings. She testified that she heard Pollard's complaints, and recognized that the problem in the peroxide area was due to the male workers not accepting a woman working in that area. In answer to a question on cross-examination, Basham testified that she was "of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." Basham, however, never investigated Pollard's complaints further.

In the face of this record, and despite the express testimony of management officials Basham and Swartz that they knew of the sexual harassment, counsel for DuPont – both at trial and in their briefs on appeal – maintain that there was no sexual harassment and that no DuPont managers had any knowledge of harassment. At oral argument on appeal, the following testimony from Basham, the general overall supervisor of the peroxide department, was read to Ms. N. Victoria Holladay, counsel for DuPont:

> Q: And you were of the firm belief that she had been harassed on account of her sex in the peroxide area, correct?
>
> A: Yes.

Q: Now, you talked about this situation with Alan Hubbell on several occasions, did you not?

A: Yes.

Q: And Mr. Hubbell's position in 1994-'95 was what?

A: He was the area manager of hydrogen peroxide.

Joint Appendix at 412. In the face of this testimony expressly acknowledging sexual harassment and knowledge, counsel maintained that there was no such harassment and no knowledge by DuPont management.

In May 1995, a specialist in diversity training from DuPont headquarters named Bernie Scales attended the Women's Network meeting. Pollard told Scales of the problems in the peroxide area. Scales spoke to the plant manager about the problem, who subsequently spoke to Bob Shaw, employee relations manager for the plant. Shaw, Lee Ann Rice, and Gary Fish met with plaintiff on May 28, 1995 to discuss her complaints. According to Shaw and Rice, Pollard recounted fully all of her complaints at this meeting. Subsequently, Shaw and Rice spoke to Carney about his behavior. Carney never received a formal written reprimand, was never suspended, transferred, demoted, terminated, or in any other way disciplined for his behavior. There was no further investigation.

Carney's behavior improved for about a month (June 1995); he then returned to his old patterns of behavior in early July 1995. Plaintiff asked David Swartz to transfer her to

another shift. Swartz offered to transfer her to the control room operator position on shift "C" with Rory Bricco, the man who had refused to take direction from her when he had been an assistant operator under her some years before, and who had initiated the Bible incident at that time. Plaintiff declined that offer. In late July 1995, Pollard discovered a highlighted copy of that same Bible verse in her locker, stating "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Upon finding the note, plaintiff requested a medical leave of absence from DuPont.

In order to investigate the bible verse incident, DuPont formed a list of identical questions, answerable by a simple yes or no. When each employee denied having knowledge of the incident, no further questions were asked and the investigation was stopped. Carney himself was never questioned about his knowledge of who had placed the verse in Pollard's locker because he was on vacation at the time it occurred.

After Pollard left "A" shift, the entire shift, including supervisor David Swartz, held a party. They taped balloons to the ceiling and had a fish fry. The purpose of the party was to celebrate Pollard's departure, as Carney admitted in his testimony. Carney said at the party, "Glad the bitch is gone, glad the bitch is not coming back." David Swartz told Carney to shut up, that he did not need to hear Carney saying those things in case of future investigations concerning Pollard.

Plaintiff was on short-term disability leave for six months based in part on the advice of DuPont's psychologist. DuPont scheduled a "return to work" meeting in February of

1996 in spite of the psychologist's advice to the contrary, at which time DuPont told Pollard that they could not guarantee that she would not be put back on a shift with Steve Carney and the other members of "A" shift. When plaintiff declined to return to work under those conditions, DuPont fired her.

II. Hostile Work Environment Sexual Harassment

After reviewing the Supreme Court's decision in *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), we recently concluded that a plaintiff seeking to establish a company's liability for acts of her co-workers must show that the employer "knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action." *Fenton v. HiSan, Inc.,* 174 F.3d 827, 830 (6th Cir. 1999).

Defendant DuPont challenges the district court's determination that plaintiff was harassed on the basis of her sex because the conduct, according to DuPont, was gender-neutral and non-sexual in nature. In order to prove that forms of conduct not inviting sexual relations constituted sexual harassment, plaintiff "'must show that but for the fact of her sex, she would not have been the object of harassment.'" *Williams v. General Motors Corp.,* 187 F.3d 553, 565 (6th Cir. 1999) (quoting *Henson v. City of Dundee,* 682 F.2d 897, 904 (11th Cir. 1982)).

As the district court found, there was overwhelming testimony as to the anti-female animus which the men in peroxide consistently demonstrated, specifically toward women working in the peroxide area (as opposed to women filling traditionally "female" jobs, such as secretaries and office workers in other areas of the DuPont compound). We have recited these facts in detail above.

Plaintiff must prove that, after considering the totality of the circumstances and the context in which certain treatment of plaintiff occurred, the harassment which she sustained was sufficiently pervasive and severe as to alter the conditions of her employment and create an abusive working environment. Each alleged act of harassment must not be viewed in a vacuum, but must be considered together with the other acts. Characteristics such as their frequency, intensity, and whether they "merely" created psychological trauma or whether they actually interfered with a plaintiffs work are all factors to be considered.

In the recent *Williams* decision, we determined that the following behavior was severe and pervasive enough to constitute harassment: co-workers who used foul language, such as "fuck" and "slut"; sexual innuendos concerning the plaintiff's breasts or sexual prowess; tasteless sexually-based jokes and puns directed toward plaintiff; co-workers conspiring against her in order to force her onto another shift; objects glued to the top of her desk; being told "I'm sick and tired of these fucking women" and having a box thrown at her simultaneously; being denied overtime and breaks; and other "pranks," such as being locked in a room, or finding materials blocking her way into or out of an area of the plant. *See Williams,* 187 F.3d at 559. This behavior seems clearly to encompass many types of sexual harassment: actual sexual propositioning, offensive language or behavior about women in general and women in the workplace, and non-sexual actions directed toward a plaintiff in order to interfere with her work. Plaintiff here proved daily sexually degrading comments about women which often occurred outside of her hearing; a co-worker who instructed the men working as her assistants not to take direction from plaintiff or talk to her at any time because of her gender; several incidents of plaintiff not being informed of facts concerning her job which would

result in an appearance of incompetence on her part, and which could be potentially physically dangerous to her and to other members of the plant; isolated incidents occurring within her hearing of women being called "heifers" and being degraded for their inability to accomplish tasks as well as men; being subjected to false alarms and practical jokes, such as her dinner being burned, with the alleged intent of driving plaintiff away from her shift; and the Bible verse concerning women's proper submissive role being placed in her locker. This conduct constitutes severe and pervasive harassment, just as severe and pervasive as in *Williams* and our other co-worker sexual harassment precedent.

Next, we address the issue of whether or not DuPont received actual or constructive notice of Pollard's complaints and responded reasonably. DuPont challenges the court's factual findings, arguing that the findings concerning DuPont's lack of responsiveness towards Pollard's numerous complaints were clearly erroneous. Specifically, as pointed out above, DuPont continues to argue that the testimony at trial failed to establish that DuPont was ever made aware that any sex-based derogatory comments were addressed to Pollard. This argument assumes that only sex-based derogatory language is actionable under Title VII, and fails to consider the testimony related to a lack of work-related communication, sabotage of plaintiffs work, and personal isolation and harassment, all of which was based on the belief that women should not work in the peroxide area.

After reviewing the trial testimony in this case, we believe that the trial court's findings of fact were correct. The testimony at trial indicated that plaintiff told her direct supervisor, David Swartz, of the incidents of harassment on numerous occasions. David Swartz, in particular, was independently aware of the language, isolation, and

communication problems on "A" shift through his own observations of the shift, even absent plaintiff's complaints to him. In addition, Beth Basham, David Swartz's supervisor, testified that although she believed, based on Pollard's complaints during Women's Network meetings, that Sharon Pollard was being harassed by her coworkers because they could not accept a woman working in the peroxide area, she never initiated any further investigation concerning the allegations. After the most blatant episode, when Pollard found the Bible verse in her locker, DuPont management interviewed the members of "A" shift with a list of yes-or-no questions, and when they responded "no" to the question concerning knowledge about the event, the interviews were concluded. The lack of an admission under such circumstances is not surprising. No member of the peroxide area was ever formally reprimanded, suspended, or transferred to another shift due to any of their actions. Finally, Bob Shaw confirmed in his testimony that Sharon Pollard was told that if she returned to work, she would be put back on the same shift with Steve Carney and the other members of "A" shift, although a woman would be added to the shift.

This testimony is countered by DuPont's arguments 1) that the men were instructed not to behave inappropriately and to continue to communicate with Pollard as to work-related matters once DuPont became aware of Pollard's work isolation; 2) that DuPont posted notices explaining what constituted inappropriate conduct after learning of the July 1995 Bible verse incident and explained that conduct of that nature would result in termination; 3) that a good-faith investigation, even if ineffective, should shield DuPont from liability; and 4) that her complaints to her direct supervisor, David Swartz, as well as the complaints made in the context of Women's Network meetings, were not actually complaints

to management about harassing conduct, and therefore did not put DuPont on actual notice of her problems. These arguments are not persuasive. Not only was it reasonable for the district court to conclude that members of DuPont management were actually aware of Pollard's harassment complaints, the district court was justified in finding that DuPont's reaction to Pollard's complaints did not constitute a "good faith" effort to remedy the situation. As noted above, this trial produced substantial evidence that several members of DuPont management were aware of Pollard's situation, both through her complaints and through first-hand experience, but they allowed the situation to fester without definitive action on the part of management. Steve Carney's behavior toward Pollard was well known. No disciplinary action was taken against him.

We next address DuPont's argument that Pollard's claim was one of retaliation, not sexual harassment, and thus that the decision holding that sexual harassment existed must be reversed. This is a red herring argument. There is nothing in Pollard's testimony, her complaints to DuPont, or her complaint initiating this action which indicates that DuPont took adverse action against her for complaining of the treatment she was receiving on "A" shift. The complaints indicate quite clearly that Pollard's problem was with her treatment by the other members of her shift and DuPont's inaction with respect to that problem, not any further action which DuPont took against her.

Finally, we turn to DuPont's claim that plaintiff cannot prevail on her claim of hostile work environment sexual harassment because she did not prove disparate treatment. Disparate treatment sexual harassment (assuming that by "disparate treatment" DuPont means harassment subject to the McDonnell Douglas test) is inherently different from hostile

work environment sexual harassment. The federal courts treat the two types of cases differently for good reason. The McDonnell Douglas framework is meant to prove that conduct which might have some otherwise legitimate motive (such as promoting a man instead of a woman) was in fact based upon discriminatory motive. When a plaintiff proves that a hostile work environment existed, there is no legitimate justification for such an environment, and thus recourse to the McDonnell Douglas test is not warranted. A defendant's only option is to deny the charges or argue that defendant effectively remedied the situation, not to submit that the hostile environment was in some way warranted. Additionally, as the Supreme Court recognized in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 63-68 (1986), the proof of a hostile work environment is in fact part of "'the entire spectrum of disparate treatment of men and women'" in the workplace, which is in no way limited to actions which economically impact a plaintiff, such as decisions to hire, promote, or fire an employee. *Id.* at 64 (quoting *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707 (1978)). In other words, the Supreme Court has long recognized that proof of hostile work environment sexual harassment is proof of disparate treatment. For these reasons, it is one of the most basic tenets of employment discrimination law that it is not necessary to prove economic disparate treatment in order to make out a prima facie case of coworker hostile environment sexual harassment. The defendant's argument to the contrary is based upon a fundamental misunderstanding of the law.

For the foregoing reasons, we AFFIRM the district court's opinion finding DuPont liable for the co-worker sexual harassment of its employees.

III. Judicial Bias

DuPont also claims that the trial judge was so biased in his approach to this trial that DuPont was denied the fundamental right to a fair trial. During the testimony of Bob Shaw, the final defense witness and the highest-ranking member of DuPont management who testified, Judge McCalla expressed his opinions with regard to this case. He angrily challenged Shaw and questioned him for a period of time, using language that was hostile and evidenced his desire to inform Shaw of the ways in which he believed DuPont had erred in their behavior towards Pollard. The court's comments seem to indicate three things: First, that after hearing all of the testimony (with only the remainder of Shaw's testimony to be heard), the court was quite convinced that the witnesses for the plaintiff were trustworthy and the key witnesses for the defense (the other members of "A" shift, including Steve Carney) were lying. Second, the court had also concluded that DuPont's actions in attempting to remedy the harassment were entirely unsatisfactory. And, finally, the court wanted Bob Shaw to hear his comments on the way DuPont handled this case so that DuPont could learn from its mistakes in this case and proceed differently in the future.

The standard of behavior expected of a judge is different when the case is tried to the bench rather than before a jury. The Supreme Court has recently concluded in language applicable to the conduct in this case:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable

> for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

Liteky v. United States, 510 U.S. 540, 550 (1994) (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2nd Cir. 1943)).

There is no indication in the case at hand that the district court was in any way personally biased for the plaintiff before the trial began, nor is there evidence that DuPont was treated unfairly during the course of the trial. The remarks were made just prior to the conclusion of the defense case, after the district court had heard the vast majority of the evidence before it. In the absence of any evidence that the district court was unfair in his dealings with the defense during the course of the trial, it is difficult for us to conclude that the judge was unfairly biased. In addition, since there was no jury which could have been improperly influenced by the comments, there is no compelling reason to subject this case to a retrial. We believe the court's comments stemmed from the conclusions which the judge had rightly formed as part of his factfinding duty, although the comments were spoken in anger and moral outrage in response to the injustice and harm DuPont and some of its employees visited upon plaintiff. It is difficult to read the record in this case without sympathy for the plaintiff who

endured, without relief, the cruelty of Steve Carney and other male co-workers at DuPont. We therefore DENY defendant's motion for a new trial.

IV. Attorney's Fees

DuPont challenges the district court's decision to award plaintiff attorney's fees. Attorney's fee awards are reviewed for an abuse of discretion. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). Attorney's fees are generally awarded for a reasonable number of hours expended multiplied by a reasonable fee, and are generally reduced in an amount reflective of the amount of time spent pursuing claims which were ultimately unsuccessful. DuPont argues that the award of attorney's fees ($252,997.38) should have been reduced due to the district court's summary judgment for the defense on the issues of intentional infliction of emotional distress, negligent supervision, and loss of consortium. DuPont also argues that the attorney's fees are excessively high. Plaintiff argues only that the fees were "reasonable." Neither party gives any explanation, either with or without mathematical calculations, as to why the fees were "reasonable" or "unreasonable." Without a more specific claim that the attorney's fees were unreasonable, it is difficult to conclude that the award constituted an abuse of discretion. This was a hard-fought case which has gone on for four years. We are offered no basis for setting aside the fees, and therefore AFFIRM the district court's award of attorney's fees.

V. Statutory Limitation of Front Pay

Pollard cross-appeals on the basis that front pay should not be subject to the limitations on "compensatory damages" under 42 U.S.C. § 1981a. The district court noted that it was

bound by this Circuit's decision in *Hudson v. Reno,* 130 F.3d 1193 (6th Cir. 1997), which held that front pay was subject to the $300,000 statutory cap because front pay was an element of future pecuniary losses. Pollard now argues that front pay is not an element of future pecuniary losses, but is instead a replacement for the remedy of reinstatement in situations where reinstatement would be inappropriate. The Equal Employment Opportunity Commission, in an amicus brief, agrees with Pollard that the *Hudson* case was wrongly decided.

First, the argument is made that § 1981a, by its very terms, explicitly excludes remedies which were traditionally available under Title VII from the statutory cap, and notes that front pay was a traditionally available remedy. Second, the argument is made that the legislative history of the statutory cap on compensatory damages clearly indicates that front pay was not intended to be included in it. Third, plaintiff claims that the *Hudson* decision misinterpreted existing Sixth Circuit cases examining the nature of front pay as a remedy. And finally, Pollard and the EEOC argue that public policy concerns weigh in favor of excluding front pay from the $300,000 statutory cap on compensatory damages and that other Circuits have reached a conclusion contrary to *Hudson. See Martini v. Federal Nat'l Mortgage Ass'n,* 178 F.3d 1336, 1348-49 (D.C. Cir. 1999); *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545, 556 (10th Cir. 1999); *Kramer v. Logan County Sch. Dist. No. R-I,* 157 F.3d 620, 625-26 (8th Cir. 1998). *See also Rivera v. Baccarat, Inc.,* 34 F. Supp.2d 870, 878 (S.D.N.Y. 1999); *Bizelli v. Parker Amchem,* 17 F. Supp.2d 949, 954 n.2 (E.D. Mo. 1998).

We agree with these arguments, but our hands are tied. One panel of this court may not overturn the decision of another panel of this court – that may only be accomplished

through an en banc consideration of the argument. Plaintiff does not purport to distinguish *Hudson*. Therefore, we must decline to overturn the district court's decision that front pay is included in the compensatory damages statutory cap found at 42 U.S.C. § 1981a.

VI. Constitutionality of the Statutory Cap on Damages

Plaintiff cross-appeals on the basis that the statutory cap on compensatory damages found at 42 U.S.C. § 1981a is an unconstitutional violation of the Separation of Powers doctrine. Pollard argues that by creating the statutory cap, Congress impermissibly encroached upon the judiciary and its "traditional responsibility" for assuring against excessive verdicts on a case-by-case basis. We do not find this argument persuasive. Congress created Title VII, and Congress may designate the remedies under Title VII. *See Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion) (holding that where Congress creates a statutory right, "it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies.") The fact that the judicial branch is limited in the amount of damages which it may award does not mean that its ability to decide cases is being impaired by Congress.

Pollard also argues that the statutory damages provision violates the Equal Protection Clause of the Fourteenth Amendment in that it unfairly discriminates among those persons who wish to vindicate their rights with respect to racial discrimination and those who wish to vindicate their rights with respect to gender discrimination. Since the statute at issue is a federal one, we assume that plaintiff meant to invoke the implied equal protection clause inherent in the Due Process Clause of the Fifth Amendment, which is applicable

to the federal government. The parties agree that the statute must stand if it bears a rational relationship to any legitimate articulated government purpose.

42 U.S.C. § 1981a places a $300,000 statutory cap on all intentional discrimination on the basis of race, national origin, sex, religion, or disability (as defined in the Americans with Disabilities Act). The statute is inherently equitable on its face. The difference in the application of this statute in situations of gender or race discrimination occurs due to a provision in the Act which states that nothing in section 1981a is to be construed as in any way limiting the remedies provided in section 1981 itself, which does not limit recovery for intentional discrimination based upon race or national origin. However, section 1981 provides relief for a different type of claim than encompassed by the remedies available to plaintiff in section 1981a. Section 1981 provides for relief from discrimination in the making and enforcing of contracts, while section 1981a provides for relief purely from intentional discrimination in the employment context. While section 1981 includes contracts for employment, it also includes contracts for admission to organizations, insurance and other business contracts with private persons or corporations, and admission to schools. Plaintiff cannot therefore be said to be "similarly situated" with section 1981 claimants.

Even if plaintiff is similarly situated with a section 1981 claimant due to the fact that employment discrimination is covered under both acts, her claim still fails. Discrimination on the basis of race and national origin is indisputably the cornerstone of our entire body of civil rights law. In a political compromise, the Civil Rights Act of 1991 was limited in the remedies which it would provide due to a belief that unlimited damages for all forms of discrimination

would force employers to institute hiring quotas for their own economic safety. *See* 137 Cong. Rec. S15472-01 (discussing the fear of quotas that drove the compromise which was reached in the Civil Rights Act of 1991). The adoption of the provision saving the remedies available under section 1981 was rationally related to the legitimate purpose of creating reasonable damages available to all other victims of intentional discrimination without being forced to limit the damages already available to victims of racial and ethnic discrimination.

For the foregoing reasons, we AFFIRM the opinion of the district court limiting plaintiffs award pursuant to 42 U.S.C. § 1981a.

VII. Summary Judgment for the Defense on the Common Law Claims

Finally, plaintiff cross-appeals the district court's decision to grant summary judgment for the defense on plaintiff's claim of intentional infliction of emotional distress. The conduct alleged by a plaintiff must satisfy an extremely high burden in order to survive a motion for summary judgment with respect to a claim of intentional infliction of emotional distress in Tennessee. The district court in this case correctly quoted the appropriate language from *Dunn v. Moto Photo, Inc.*, 828 S.W.2d 747, 751 (Tenn. Ct. App. 1991), saying that the conduct must be that which would be deemed utterly intolerable in a civilized society. That case makes it clear that criminal, tortious, intentional, or malicious conduct does not automatically satisfy the standard. We believe, however, that the intentional and malicious conduct found by the district court in this case is unusually egregious and raises a factual issue with respect to the outrageousness of the behavior involved. The sort of daily, consistent harassing

behavior which Pollard endured over a period of months and years has been characterized as a type of slow torture. Her work was sabotaged, her personal safety was compromised, she was subjected to juvenile pranks intended to force her to resign from the shift, and she was repeatedly informed of her co-workers' belief in the inferiority of women. We found ourselves, after reviewing the record, proclaiming a sense of moral outrage that DuPont managers allowed the conduct of the men in the peroxide area to persist for years in silence, and therefore silent approval. Inaction by an employer, or another actor in a position to exercise control, in the face of continuous, deliberate, degrading treatment of another may rise to the level of intentional infliction of emotional distress. The tort would be unnecessary in our law as a deterrent if assault or physical harm were always made a necessary element.

We conclude that material issues of fact are presented by the outrageous nature of the conduct of DuPont employees together with the refusal of its managers to correct the situation and its blanket, continuing official denial in the face of contrary facts that discrimination based on gender occurred or that its managers were aware of the discrimination. A fact finder at the trial level will hear the case on remand and decide whether the plaintiff has met the standard enunciated by the Tennessee courts for the tort of intentional infliction of emotional distress. We therefore REVERSE the district court's decision to grant summary judgment to DuPont on this issue and REMAND for trial. Otherwise we AFFIRM the judgment of the district court. Plaintiff's [sic] motion to strike Pollard's reply brief is denied.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed August 25, 2000]

Nos. 98-6317 / 6319; 99-5125

SHARON B. POLLARD, *Plaintiff-Appellee/ Cross-Appellant,*	)
v.	)
E. I. DUPONT DE NEMOURS COMPANY, *Defendant-Appellant/ Cross-Appellee.*	)

ORDER

BEFORE: MERRITT, CLAY, and CUDAHY,* Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion of appellee/cross-appellant, and no

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* Hon. Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

judge of this court having requested a vote on the suggestion of appellant/cross-appellee, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

FEB 22 2001 (4)

No. 00-763

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether front pay is an element of compensatory damages under the Civil Rights Act of 1991.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 213 F. 3d 933 (6th Cir. 2000), and is set out at pp. 81-104 of the Joint Appendix. The order of the court of appeals denying rehearing and rehearing en banc, which is not officially reported, is set out at pp. 105-06 of the Joint Appendix. The decision of the district court, dated August 20, 1998, which is reported at 16 F. Supp. 2d 913 (W.D.Tenn. 1998), is set out at pp. 51-78 of the Joint Appendix.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2000. Both parties filed timely petitions for rehearing and suggestions for rehearing *en banc*, which were denied on August 25, 2000. The petition for a writ of certiorari was filed on November 13, 2000. Certiorari was granted on January 8, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706(g)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(1) as amended, provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to,

reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

Section 1981a(a)(1) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides in pertinent part:

> *Civil rights*--In an action brought by a complaining party under 42 U.S.C. 2000e-5 . . . of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 42 U.S.C. 2000e-2, -3, or -16 of the Act, and provided that the complaining party cannot recover under 42 U.S.C. 1981 of the Revised Statutes, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 2000e-5(g) of the Civil Rights Act of 1964, from respondent.

Section 1981a(b)(2) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides:

> *Exclusions from compensatory damages*--Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 2000e-5(g) of the Civil Rights Act of 1964.

Section 1981a(b)(3) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides:

> *Limitations*--The sum of the amount of compensatory damages awarded under this

section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Section 1981a(c) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides in pertinent part:

> *Jury trial*--If a complaining party seeks compensatory or punitive damages under this section --

(1) any party may demand a trial by jury . . .

STATEMENT OF THE CASE

Petitioner and her husband brought this action in 1995 against DuPont, petitioner's former employer, alleging that she had been discriminated against on the basis of her sex in violation of Title VII of the 1964 Civil Rights Act. The complaint asserted that petitioner had been subjected to repeated harassment from 1987 to 1995, and then dismissed in 1996 because she refused to submit to continued harassment.

The case was tried before the district judge rather than a jury. The district judge concluded that petitioner had indeed been the target of a protracted campaign of gender-based harassment and that DuPont officials had repeatedly refused to take action to stop abuses of which they were well aware. The court awarded Pollard $107,364 in back pay and benefits and $300,000 in compensatory benefits, the maximum permitted in a Title VII action. 42 U.S.C. § 1981a(b)(3). The district judge concluded that the compensatory award was "in fact, insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered . . . ." (J.A. 77 n. 19). Because the compensatory award already equalled the statutory cap, the court was unable to make any punitive award; the district judge pointedly explained that "absent the statutory cap, the Court would have awarded punitive damages based upon DuPont's repeated failure to remedy this egregious situation." *Id.*

The district court also held that Sixth Circuit precedent precluded it from making any award of front pay. Petitioner offered evidence that reinstatement was impracticable, and the trial judge indicated that he would have ordered front pay had

he been able to do so. (J.A. 68-69). But in *Hudson v. Reno*, 130 F. 3d 1193, 1204 (6th Cir. 1997), the Sixth Circuit had held that front pay awards were within the cap imposed by section 1981a(b)(3). Because the compensatory award alone had already equalled that cap, the trial court concluded that no front pay award was permissible. (J.A. 77 n. 19).

On appeal the Sixth Circuit emphatically affirmed the liability finding, expressing incredulity that DuPont continued to insist that there was "no such harassment and no knowledge by DuPont management." (J. A. 88-89). The appellate court observed that "[i]t is difficult to read the record in this case without sympathy for the plaintiff who endured, without relief, the cruelty of Steve Carney and other male co-workers at DuPont." (J.A. 98-99). It noted that the trial judge "was quite convinced that the witnesses for the plaintiff were trustworthy and the key witnesses for the defense . . . were lying." (J.A. 97).[1]

In the court of appeals petitioner attacked the soundness of the holding in *Hudson v. Reno* that front pay is subject to the section 1981a(b)(3) cap on compensatory damages. The three judges on that panel were persuaded by Pollard's contentions, but were constrained by prior precedent. "We agree with these arguments, but our hands are tied. One panel of this court may not overturn the decision of another panel of this court . . . ." (J.A. 100).

STATEMENT OF THE FACTS

At all relevant times petitioner was an Operator in the hydrogen peroxide production plant owned by DuPont in

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[1] The trial judge commented from the bench at the end of the trial that he believed that several defense witnesses had lied. Tr. 1267, 1282-83.

Memphis, Tennessee. The plant is a sprawling, outside facility with a complex array of tanks, production units, pipes and laboratories. At any given moment it has thousands of gallons of highly dangerous chemicals; a serious mishap in the operation of the plant could cause a dangerous, potentially fatal explosion. Pollard was the only female employee on the "A" shift, which usually worked nights.

The district court concluded that Pollard was the victim of a "long-term campaign of harassment, intimidation, and isolation . . . by the men on 'A' shift." (J.A. 74)[2]. It was well known that the men on the 'A' shift objected to the employment of women in the hydrogen peroxide unit. (J.A. 55, 71, 84). Steve Carney, the Control Room Operator who led that campaign, "stated that women didn't belong there approximately five times per week, and routinely referred to women as 'bitches' and 'cunts'." (J.A. 71, 84). Petitioner's position as an Operator gave her supervisory authority over several male Assistant Operators, a status which the men found particularly galling. (J.A. 54, 55, 88).

In February of 1994 the men of 'A' shift, led by Carney, began a concerted effort to drive Pollard from her job. (J.A. 54, 84). The harassment stepped up when Pollard, at the request of company officials, spoke to girls at a "Take Your Daughters to Work Day" in April 1994, an event which

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[2] At the end of the trial, the district judge commented to the last DuPont official who testified:

> "[Y]ou let a bunch of men beat up on a woman in the workplace. . . . You basically let them engage in psychological torture of a person who is strong-willed, smarter than they were, there isn't anybody else on your shift that was as capable as this lady. . . . You surrendered control of this area, three square blocks area to a thug and let him do this to somebody."

Tr. 1265-66.

several of the men openly deplored. (J.A. 54, 84). The harassment continued until July 1995, when Pollard was driven to take medical leave, an event which was openly celebrated at a party held at the plant and attended by both her tormentors and her own supervisor. (J.A. 68, 90).

Beginning in February 1994, the employees on the night shift with Pollard resolutely refused to talk to her, a practice that continued night after night for a year and a half. (J.A. 54-58, 62-64, 68, 84-85).[3] At Carney's direction, Pollard's own subordinates refused to obey any of her instructions unless Carney told them to do so. (J.A. 60, 84). Although all the other 'A' shift workers ate together during their breaks, petitioner was not permitted to join them. (J.A. 55, 84). If petitioner entered the break room at the peroxide facility, all the other employees would leave, usually muttering in a hostile manner under their breaths. (J.A. 55). As the Control Room Operator, Carney monitored the equipment which would reveal a malfunction in the production facility. Carney repeatedly gave Pollard false reports of equipment failures, sending her running through the dark and dangerous facility. (J.A. 58, 85-86). Even more seriously, Carney on several occasions deliberately failed to tell Pollard about actual malfunctions in the equipment for which she was responsible. (J.A. 58-59, 86).

This malicious refusal to communicate posed a serious danger to the plant, and to Pollard personally. Petitioner complained in vain to the men and to her supervisor that the lack of communication involved a risk of a chemical spill or explosion. (J.A. 60-61, 86-87). At company sponsored meetings of female employees, petitioner told her colleagues, some of whom were managers, that "[s]he was concerned that

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[3] One employee would on occasion speak secretly to Pollard if none of the other men were present. (J.A. 84).

something would happen that would endanger her and they would not tell her." (J.A. 63-64, 87).

The men also engaged in concerted activity to sabotage Pollard's work. One of her critical responsibilities was to test the contents of hydrogen peroxide tanks after a device known as a vaporizer was removed; Pollard would designate the point when her subordinates were to remove the vaporizers and would then test the tanks at the appropriate time. On at least seven occasions, at Carney's direction, Assistant Operators removed the vaporizers ahead of schedule and deliberately did not tell petitioner. This misconduct prevented the facility from having sufficient peroxide ready for timely delivery and created the appearance that Pollard was at fault. (J.A. 60, 86-87).

On one occasion when the employees were leaving the plant, Carney used his truck to try to force petitioner's car off the road. (J.A. 63, 87). The tires on the bicycle Pollard used at the plant were slashed. (J.A. 61, 87). At times Carney would trigger false alarms while petitioner was heating food in the break room; when she ran out into the facility to correct the non-existent problem, other employees would turn up the stove to ruin her food. (J.A. 58, 86). When their duties forced the men to be in the same room as petitioner, they would make explicit, at times crude derogatory remarks about women. (J.A. 55-56, 85). In late July 1995 Pollard discovered in her locker a highlighted copy of a Bible verse reading "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." (J.A. 67, 90). The trial judge held these events had created "a pervasively hostile environment" (J.A. 73) and that there was "absolutely no doubt in the Court's mind that the harassment of plaintiff was based on her gender." (J.A. 71).

The district court also concluded that company supervisors were well aware of this campaign of harassment, and did nothing to stop it. "This is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched. Plaintiff repeatedly complained to DuPont management to no avail." (J.A. 76).

Pollard complained again and again to her shift supervisor, David Swartz. Swartz had personal knowledge of much of the abuse. (J.A. 56-58, 60-61, 63, 75, 93-94). Often Swartz simply did nothing in response to Pollard's objections. Although Swartz testified that in one instance he had talked to the men on 'A' shift about their conduct, most could not recall his having actually done so. (J.A. 57). When Carney was verbally abusive to Pollard in the presence of Swartz, she asked Swartz if he was going to continue to permit that treatment; Swartz's only response was to end the meeting. (J.A. 63, 87-88). Carney testified that Swartz had abandoned efforts to correct Carney's behavior because "he knows I'm hardheaded" and would persist in that misconduct. (J.A. 85)[4]. Swartz conducted no investigation of Carney's attempt to force Pollard's car off the road (J.A. 63, 66, 87), and pursued no investigation of the tire-slashing and false alarm incidents once Carney denied culpability. (J.A. 66, 88).

Pollard also complained to Swartz's superior, Beth Basham, who had overall responsibility for the peroxide unit. Basham conceded that she "knew there was a real problem in

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[4] One company official told the men, "You don't have to talk to her socially." In a comment at the end of trial to a company manager, the judge observed: "[T]hey took that as a license to engage in the most flagrant type of conduct, which is contrary to our laws. You gave them the green light, and you can't do that, and you shouldn't have done it." Tr. 1264.

the peroxide area of the male workers accepting the role of a female in the area" and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." (J.A. 64). Basham, however, never investigated the situation, never wrote any report about the problem to upper management, and "could not recall" if she had ever discussed the manner informally with anyone at DuPont headquarters. (J.A. 65).

At other times Pollard complained to Bernie Scales, a diversity representative from DuPont headquarters, Bob Shaw[5], the employee relations manager for the plant, Lee Ann Rice, a human resources manager at the plant, and Gary Fish, a plant shift supervisor. (J.A. 65-66). Scales in turn took the matter up with Gary Lewis, the plant manager. (*Id.*). With the exception of a single conversation between Shaw and Carney, which had no lasting effect, none of these managers took effective action to redress Pollard's complaints. "Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations." (J.A. 66).

> In spite of all of the complaints plaintiff made against him, and the fact that the situation did not improve, Steve Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated.

(J.A. 76).

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[5] There was considerable evidence that Shaw had personal knowledge of the harassment. Tr. 1273-75, 1279.

After eighteen months of withering abuse, and in the face of the company's adamant refusal to act, Pollard finally went on temporary medical leave in July of 1995. "After Pollard left 'A' shift, the entire shift, including supervisor David Swartz, held a party. They taped balloons to the ceiling and had a fish fry. The purpose of the party was to celebrate Pollard's departure, as Carney admitted in his testimony. Carney said at the party, 'Glad the bitch is gone, glad the bitch is not coming back.' David Swartz told Carney to shut up, that he did not need to hear Carney saying those things in case of future investigations concerning Pollard." (J.A. 68, 90).

After Pollard went on medical leave, she had several discussions with company officials about the possibility of returning to work. A DuPont psychologist concluded that the effect of the harassment was so severe that Pollard could not return to work at DuPont. (J.A. 68-69, 90-91). Shaw met with Pollard and warned her, "I just don't want you to come back to work with the misconception that things are going to be a lot different, a lot better." (Tr. 121). Pollard expressed a willingness to return to the plant if she would not have to work with the harassers who had driven her from her job seven months earlier. Company officials, however, rejected Pollard's request for an assurance that she would not have to work with Carney. When Pollard refused to resume work under those conditions, DuPont fired her. (J.A. 69, 91, 94).

The impact on petitioner of this prolonged and severe harassment was profound. "[S]he suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness. A psychologist and a psychiatrist who saw plaintiff both concluded that she suffered from post-traumatic stress disorder." (J.A. 74).

SUMMARY OF ARGUMENT

Section 1981a(b)(2) expressly defines the scope of "compensatory damages" under that section in a manner that excludes front pay:

> *Exclusions from compensatory damages*--Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section [706(g)] of the Civil Rights Act of 1964.

When section 1981a was enacted in 1991, there was a widespread consensus that front pay was indeed "relief authorized under section [706(g)]." Dozens of decisions in eleven circuits, including the Sixth Circuit, had by that year recognized the availability of front pay awards under Title VII. See Appendix A.

"When . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). In the instant case knowledge need not merely be presumed; the legislative history of section 1981a contains repeated references to the availability of front pay under section 706(g), including by an Assistant Attorney General and by the United States Commission on Civil Rights.

The 1991 Civil Rights Act states that its purpose is to provide "additional remedies" for intentional discrimination. If, however, front pay were treated as part of compensatory damages and thus subject to the caps in section 1981a(b)(3), front pay relief would be limited in a manner that was not true prior to 1991. The result would be that discrimination victims

such as petitioner would receive reduced, not additional, remedies.

The Sixth Circuit erred in reasoning that the section 1981a(b)(3) cap applies to front pay because it limits "future pecuniary losses." That provision does not place a cap on all Title VII monetary awards, but restricts only "compensatory damages *awarded under this section.*" (Emphasis added). Since front pay, by virtue of section 1981a(b)(2), simply is not part of compensatory damages under section 1981a, front pay is not subject to the section 1981a(b)(3) limitations.

This interpretation of the language of section 1981a is consistent with its legislative history. The original opponents of the damage provision never advocated capping existing section 706(g) monetary relief, and the original proponents never favored permitting juries to determine backpay or front pay awards. The language contained in section 1981a(b)(2) and 1981a(b)(3), originally drafted by Senator Danforth, was intended as a compromise of the previous positions of the two contending sides.

Front pay is a practical and important alternative to reinstatement where a trial court concludes that reinstatement cannot be effectuated, or should be delayed. Where there is no vacancy into which a discrimination victim can be reinstated, the lower courts have long regarded front pay as preferable to bumping an incumbent employee in order to create a vacancy. *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 267-70 (4th Cir. 1976). If the cap in section 1981a(b)(3) precluded a front pay award in a given case, that would compel the lower courts to resort to otherwise disfavored forms of injunctive relief.

INTRODUCTION

Title VII forbids an employer from discriminating in hiring, promotions or dismissals on the basis of gender, race, national origin or religion. When violations of this prohibition occur, courts will where possible order that the victim be reinstated into to the position in question. In practice, however, reinstatement often must be delayed until a vacancy exists, and sometimes simply is not feasible at all. When these remedial problems arise, the lower courts have for a quarter century ordered awards of front pay, based on the wage the employer would have paid the victim had immediate reinstatement been directed. "[F]ront pay is . . . the monetary equivalent of reinstatement, to be given in situations where reinstatement is impracticable or impossible." *Kramer v. Logan County School District*, 157 F. 3d 620, 626 (8th Cir. 1998).

Prior to 1991 the monetary relief authorized in a Title VII action was back pay and "any other equitable relief as the court deems appropriate."[6] 42 U.S.C. § 2000e-5(g). These provisions of section 706(g) were long understood to authorize an award equal to the difference between a discrimination victim's actual income and the wage that he or she would have received but for the proven discrimination. Under the terminology that has prevailed in the lower courts for two decades, such awards for the period prior to the entry of judgment in the district court have been denoted "backpay"; when such an award is made for a period of time

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[6] The language regarding "any other equitable relief" was added in 1972. The Conference Report regarding this provision explained that the amendment was "intended to give the courts wide discretion in exercising their equitable power to fashion the most complete relief possible." 118 Cong. Rec. 7166, 7168 (1972).

after final judgment, it is referred to as "front pay."[7] Front pay is "in essence, a continuation of back pay under § 706(g) beyond the date of judgment." 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1815 (3d ed. 1996).[8]

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[7] Lower courts occasionally refer to such orders in other terms, *e.g.*, "additional backpay." *Suggs v. Servicemaster Education Food Management*, 72 F. 3d 1228, 1234 (6th Cir. 1996).

[8] The earliest reported case using this term appears to be *White v. Carolina Paperboard Corp.*, 1975 WL 250 *8 (W.D.N.C.), *aff'd* 564 F. 2d 1073, 1077, 1087 (4th Cir. 1977). In earlier Title VII cases monetary awards intended to redress the post-judgment effect of discrimination were characterized as "back pay" or "future pay". *See, e.g., Bush v. Lone Star Steel Co.*, 373 F. Supp. 526, 538 (E.D.Tex. 1974); *United States v. United States Steel Co.*, 371 F.Supp. 1045, 1057-63 (N.D.Ala. 1973).

The use of front pay awards in employment discrimination cases has been the subject of scholarly commentary. 2 B. Lindemann & P. Grossman, *Employment Discrimination Law*, 1815-21 (3d ed. 1996); 5 L. Larson, *Employment Discrimination* § 92.12 (2d ed.); S. Grebeldinger, *"The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay"*, 1996 U.Ill. Law. Rev. 319 (1996); Note, *"Making Plaintiffs Whole: The Need for Front Pay Under the ADEA and Other Antidiscrimination Statutes"*, 49 Law & Contemp. Probs. 238 (1986); Case Comment, *"Civil Rights--Front Pay Adopted as Available Remedy Under the Age Discrimination in Employment Act"*, 20 Suffolk U.L.Rev. 681 (1986); M. Kimler, *"Front Pay As An Appropriate Remedy Under the Age Discrimination in Employment Act"*, 32 Wayne L. Rev. 115 (1985); P. Janovsky, *"Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act"*, 53 Fordham L.Rev. 579 (1984); Note, *"Front Pay--Prophylactic Relief Under Title VII of the Civil Rights Act of 1964"*, 29 Vand. L.Rev. 211 (1976).

Front pay, like back pay, may include all aspects of the compensation paid by an employer, such as medical or retirement benefits.

This Court has on several occasions noted the existence of front pay relief.[9]

The 1991 Civil Rights Act supplemented this Title VII remedial scheme by authorizing awards of compensatory and punitive damages for intentional discrimination. 42 U.S.C. § 1981a. The 1991 Act imposed a cap, the amount of which depends on the size of a defendant's workforce, on the sum of the punitive damages and of certain elements of compensatory damages. 42 U.S.C. § 1981a(b)(3). In any case in which compensatory or punitive damages are sought, either party may demand a jury trial. 42 U.S.C. § 1981a(c).

The question presented is whether front pay is part of the compensatory damages authorized by, and thus subject to the limitations and procedures of, section 1981a. That question is of practical importance for two distinct reasons. First, as here, if the punitive and compensatory relief otherwise awarded against an employer already exceed the statutory cap, classification of front pay as part of compensatory damages would preclude any award of front pay. Second, classification of front pay as compensatory damages would mean that there would be a right to a jury trial to determine whether, and how much, front pay should be awarded. Employers, which usually disfavor jury trials, have

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[9] *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361 (1995)(ADEA); *United States v. Burke*, 504 U.S. 229, 239 n. 9 (1992)(Title VII); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 n. 38 (majority opinion), 781 (Burger, C.J., dissenting)(1976)(Title VII).

Several members of this Court participated in decisions regarding front pay while serving on a court of appeals. *Powers v. Grinnell Corp.*, 915 F. 2d 34, 42 (1st Cir. 1990)(ADEA)(opinion joined by Breyer, J.); *Lander v. Lujan*, 888 F. 2d 153, 159 (D.C.Cir. 1989)(Ginsburg, J., concurring); *Fadhl v. City and County of San Francisco*, 741 F. 2d 1163 (9th Cir. 1984)(opinion for the court by Kennedy, J.).

in this circumstance argued that front pay should not be treated as compensatory damages.[10]

I. THE LANGUAGE OF SECTION 1981a PRECLUDES TREATING FRONT PAY AS PART OF COMPENSATORY DAMAGES

(1) The language of section 1981a is largely dispositive of the question in this case. Subsection (b)(2) expressly defines the scope of "compensatory damages" under that section.

> *Exclusions from compensatory damages*-- Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section [706(g)] of the Civil Rights Act of 1964.

Subsection (a)(1) provides that compensatory and punitive damages are "in addition to any relief authorized by section [706(g)]." When section 1981a was enacted in 1991, there was a widespread consensus that front pay was indeed "relief authorized under section [706(g)]." More than forty decisions in eleven circuits, including the Sixth Circuit, had by that year recognized the availability of front pay awards under Title VII; those decisions are set forth in Appendix A to the brief. In *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), this Court had noted the possible utilization

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[10] *McCue v. State of Kansas, Dept. of Human Resources*, 165 F. 3d 784, 790-92 (10th Cir. 1999), *rev'g* 948 F. Supp. 965, 966-68 (D.Kan. 1996).

If front pay is now part of compensatory damages, that might affect the tax status of such payments under the Internal Revenue Code. *See United States v. Burke*, 504 U.S. 229, 241 n. 12 (1992).

of front pay in Title VII cases. 424 U.S. at 777 n. 38 (majority opinion), 781 (Burger, C.J., dissenting); a number of lower courts read *Franks* as approving what was in any event an uncontroverted form of relief under section 706(g).[11] In an Enforcement Guidance issued shortly after the adoption of the 1991 Act, the EEOC concluded that front pay is not part of compensatory damages under section 1981a because front pay was by 1991 a well established section 706(g) remedy.[12]

"When . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). In the instant case knowledge need not merely be presumed; the legislative history of section 1981a contains repeated references to the availability of front pay under section 706(g). Early in the Senate hearings on the bill, Assistant Attorney General Ayer specifically called the existence of front pay to the attention of the Senate Judiciary Committee.[13] In the arguments regarding

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[11] *EEOC v. Safeway Stores, Inc.*, 634 F. 2d 1273, 1281 (10th Cir. 1980); *Ford v. Rigidply Rafters, Inc.*, 984 F. Supp. 386, 388 (D.Md. 1991); *Gallo v. John Powell Chevrolet, Inc.*, 779 F. Supp. 804, 814 (M.D.Pa. 1991); *McCann v. Litton Systems, Inc.*, 767 F. Supp. 127, 130 (S.D.Miss 1991).

[12] EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, I, II, n. 9, II A (1), *reprinted in* BNA EEOC Compliance Manual, N:6071 *et seq*.

[13] Hearing Before the Senate Committee on Labor and Human Resources on S. 2104, 101st Cong., 2d Sess. ("1990 Senate Hearings"), 109-110 (Title VII provides "equitable remedies relating to back pay and reinstatement and front pay, which were intended not to include compensatory and punitive damages.")

the proposal to authorize compensatory damages in Title VII actions, opponents argued that the existing availability of front pay supported their contention that additional remedies were unnecessary[14], while supporters, including the United States Commission on Civil Rights, insisted that front pay awards did not provide sufficient redress.[15]

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[14] 1990 Senate Hearings 201 ("Additional problems created by Section 8 of the Bill arise from the fact that it would impose compensatory damages and punitive damages on top of an existing remedial scheme which already grants to successful plaintiffs the right to recover lost wages, back pay and reinstatement or *front pay*. Since the issues of Title VII violation and reinstatement or *front pay* (where reinstatement is not feasible) are issues for the court--not the jury--while compensatory and punitive damages claims are jury questions, a serious and complex issue involving judicial economy arises.")(statement of David Maddux on behalf of the National Retail Federation)(emphasis added); Hearings on H.R 1 Before the House Committee on Education and Labor, 102d Cong., 1st Sess.("1991 House Hearings"), 251 ("Title VII provides complete relief for the concrete economic harm suffered by victims of employment discrimination. Courts can order back pay; they can order *front pay*; they can order a person reinstated to a job . . . ."")(statement of Zachary Fasman)(emphasis added); Hearings on H.R. 4000 before the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 101st Cong., 2d Sess. ("1990 House Hearings"), v. 2, 223 (testimony of David Maddux), v. 3, 13 ("For particular claimants, [Title VII and the ADEA] provide 'make-whole' remedies designed to restore them to the status they would have enjoyed had the unlawful act not occurred--reinstatement or hiring, back pay, and *front pay* where appropriate")(statement of Edward Potter)(emphasis added), 46 (report of the National Foundation for the Study of Employment Policy).

[15] 1991 House Hearings 147 ("The equitable remedies of Title VII, reinstatement and *front and back pay*, compensate for one kind of loss, but they cannot compensate for the emotional and career damage to one's life's work. They are also not enough of a deterrent - just a cost of doing business")(statement of Nancy Ezold)(emphasis added), 593 ("In some cases, courts have awarded discrimination victims '*front pay*' where the equitable remedy of

This interpretation of section 1981a is supported by the congressional findings and statement of purpose adopted as part of the 1991 Act. Congress concluded that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace", and recited that the legislation was adopted to "provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." 105 Stat. 1071. Rather than enhancing the remedies available for intentional discrimination, as Congress intended when it adopted section 1981a, reclassifying front pay as a form of compensatory damages would have imposed on such awards a cap that did not exist prior to 1991. In cases where awards of front pay alone exceeded the subsection (b)(3) caps,[16] the effect of the

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reinstatement is not appropriate, usually because the working conditions are exceptionally contentious and not expected to improve with an injunction. . . . *Front pay* has also been deemed an appropriate remedy when a deserved promotion is not readily available to a plaintiff because innocent workers would be displaced through no fault of their own. . . . However, it should be noted that courts do not automatically award *front pay* when reinstatement is not proper.")("Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy: Impact Update", A Report by the National Women's Law Center)(emphasis added), 598 (describing "lump sum front pay award"); 1990 House Hearings, v. 3, p. 249 ("Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy"), 606 ("Many forms of employment discrimination, such as on-the-job harassment, are currently left undeterred by Title VII, because employers cannot be assessed monetary damages in these situations. Even discrimination that results in backpay or *frontpay* awards is not sufficiently deterred under current law, because most instances of discrimination go unprosecuted.")(Report of the United States Commission on Civil Rights on the Civil Rights Act of 1990)(emphasis added).

[16] The limitations imposed by subsection (b)(3) can be as low as $50,000. Lump sum front pay awards greater than that amount are not uncommon. *Lewis v. Quaker Chemical Corp.*, 228 F. 3d 1152 (table), 2000 WL 1234356 * 6 (6th Cir. 2000)($179,469.12);

1991 Act under the Sixth Circuit's interpretation would be to reduce the total monetary relief awarded to a discrimination victim and to provide to the victims in such cases no new compensatory or punitive relief at all. In the instant case there was undisputed testimony that the total of petitioner's prospective lost wages would far exceed the subsection (b)(3) cap. (Tr. 601-02, 614-15). In addition, because under section 1981a compensatory damages can only be awarded in cases of intentional discrimination, 42 U.S.C. § 1981a(a)(1), reclassifying front pay as a form of compensatory damages would preclude front pay awards altogether in disparate impact cases.[17]

The use of the phrase "compensatory damages" to describe the new remedy provided by section 1981a is by itself inconsistent with the contention that front pay is included in that remedy. Compensatory damages are by their very nature mandatory; where a violation is shown, the jury or other trier of fact *must* award in compensation an amount equal to the loss occasioned by that violation. *Smith v. Wade*, 461 U.S. 30, 52 (1983). Front pay awards, on the other hand, have always been matters of discretion. The decision to grant or deny an injunction ordering reinstatement requires a classic exercise of equitable discretion; an award of

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Becker v. ARCO Chemical Co., 207 F. 3d 176, 179 n. 2 ($380,000); *Passantino v. Johnson & Johnson Consumer Products*, 212 F. 3d 493, 504 (9th Cir. 2000)($2,000,000); *Gotthardt v. National Railroad Passenger Corp.*, 191 F. 3d 1148, 1151 (9th Cir. 1999)($603,928.37); *Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F. 3d 414 (6th Cir. 1999)($529,416); *Sullivan v. National Railroad Passenger Corp.*, 170 F. 3d 1056, 1058 (11th Cir. 1999)($458,166); *Jackson v. City of Cookeville*, 31 F. 3d 1354, 1356 (6th Cir. 1994)($467,192).

[17] Front pay awards had been made in such cases prior to the 1991 Act. *E.g.*, *Association Against Discrimination v. City of Bridgeport*, 647 F. 2d 256, 269 n. 9 (2d Cir. 1981).

immediate reinstatement precludes front pay. Even if reinstatement is denied or delayed, the decision whether to award or withhold front pay, like any equitable remedy, remains a matter of judicial discretion[18]. Although back pay is rarely denied under *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421-25 (1975), the appellate courts have repeatedly upheld as within the discretion of the trial court denials of front pay that were consistent with the remedial and deterrent purposes of Title VII. See Appendix C. If, however, front pay were now an element of compensatory damages, front pay awards would become mandatory whenever wage losses continued after the entry of final judgment.

(2) The Sixth Circuit reasoned that the subsection (b)(2) exclusion did not apply to front pay because section 706(g) refers expressly to backpay, but makes no specific mention of front pay. *Hudson v. Reno*, 130 F. 3d at 1203. This argument simply ignores the plain language of subsection (b)(2), which excludes not only the specifically mentioned back pay (and interest on backpay) but also "any other type of relief authorized under section [706(g)] of the Civil Rights Act of 1964." Clearly the sole purpose of this clause is to encompass all the other types of monetary relief not expressly listed; it requires only that such relief be "authorized" by section 706(g), not that it be "specifically 'authorized' by § 706(g)." *Hudson v. Reno*, 130 F. 3d at 1203. If, as the

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[18] *Erebia v. Chrysler Plastic Products Corp.*, 863 F. 2d 47 (table), 1988 WL 125356 *3 (6th Cir. 1988); *Floca v. Homcare Health Services, Inc.*, 845 F. 2d 108, 112 (5th Cir. 1988); *Green v. USX Corp.*, 843 F. 2d 1511, 1531 (3d. Cir. 1988); *Pitre v. Western Elec. Co., Inc.*, 843 F. 2d 1262, 1278 (10th Cir. 1988); *Spears v. Board of Educ. of Pike County, Ky.*, 843 F. 2d 882, 886 (6th Cir. 1988); *Nord v. United States Steel Corp.*, 758 F. 2d 1462, 1473 n. 12 (11th Cir. 1985); *Dillon v. Coles*, 746 F. 2d 998, 1006 (3d Cir. 1984); *Ingram v. Madison Square Garden Center, Inc.*, 709 F. 2d 807, 813 (2d Cir. 1983).

Sixth Circuit argued, the subsection (b)(2) exclusion applies only to the two remedies that are expressly listed in that subsection, then these last seventeen words of the subsection would be stripped of any operational significance.

The Sixth Circuit asserted that front pay was not within the subsection (b)(2) exclusion because in its view front pay is a "legal" rather than an equitable remedy. *Hudson v. Reno*, 130 F. 3d at 1203-04. Were that the case, front pay would indeed be outside the scope of the subsection (b)(2) exclusion of section 706(g) remedies, because section 706(g) itself only authorizes equitable relief. But if that were so, front pay would never have been a permissible remedy at all under Title VII prior to 1991. The Sixth Circuit itself, however, had on repeated occasions prior to 1991 recognized the availability of front pay under Title VII[19], and, like numerous other circuits[20], had previously characterized such awards as "equitable".[21] The Sixth Circuit decision in *Shore*

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[19] *Erebia v. Chrysler Plastic Products Corp.*, 863 F. 2d 47 (table), 1988 WL 125356 * 2 (6th Cir. 1988); *Spears v. Board of Educ. of Pike County, Ky.*, 843 F. 2d 882, 885-86 (6th Cir. 1988); *Shore v. Federal Express Corp.*, 777 F. 2d 1155, 1159-60 (6th Cir. 1985); *Day v. Wayne County Bd. of Auditors*, 749 F. 2d 1199, 1201 (6th Cir. 1984). *Hudson v. Reno* itself emphasized that front pay had been available under Title VII prior to 1991. 130 F. 3d at 1203.

[20] *E.g.*, *Simmons v. Marsh*, 917 F. 2d 23 (table), 1990 WL 163059 *5 (4th Cir. 1990); *King v. Staley*, 849 F. 2d 1143, 1145 (8th Cir. 1988); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980).

[21] *Erebia v. Chrysler Plastic Products Corp.*, 863 F. 2d 47 (table), 1988 WL 125356 * 2 (6th Cir. 1988); *Gutzwiller v. Fenik*, 860 F. 2d 1317, 1333 (6th Cir. 1988); *Mitroff v. Xomoc Corp.*, 797 F. 2d 271, 274 (6th Cir. 1986).

Since 1991 the Sixth Circuit has continued to characterize front pay as an equitable remedy. *Thurman v. Yellow Freight Systems, Inc.*, 97 F. 3d 833, 834 (6th Cir. 1996); *Shore v. Federal*

v. Federal Express, 777 F. 2d 1155 (6th Cir. 1985), is one of the leading pre-1991 cases approving front pay under Title VII; it was cited both in the legislative hearings on the 1991 Civil Rights Act[22] and by this Court in *United States v. Burke*, 504 U.S. 229, 239 n. 9 (1992) as illustrating the availability of front pay under section 706(g).[23]

Express Corp., 42 F. 3d 373, 377 (6th Cir. 1994).

The Sixth Circuit analyzed that issue at length in *Schwartz v. Gregori*, 45 F. 3d 1017 (6th Cir. 1995). This Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), held that only equitable relief is available in an action brought under section 502(a)(3) of ERISA. In the wake of *Mertens*, the Sixth Circuit concluded that front pay was an equitable remedy, and thus remained available in such actions, relying on that circuit's "historical assessment" that front pay was equitable relief in Title VII cases. 45 F. 3d at 1023.

[22] 1991 House Hearings, p. 593 n.4; 1990 House Hearings, p. 249 n. 4.

[23] In support of its contention that Title VII front pay is a legal remedy, the court in *Hudson v. Reno* asserted that in prior decisions, although the availability of front pay had been decided by the trial court, the amount of the front pay had been determined by a jury. 130 F. 3d at 1204. Two of the cited cases, however, arose under the Age Discrimination in Employment Act, which contains an unusual provision, not present in Title VII, authorizing a jury trial of "any issue of fact in any such action". 29 U.S.C. § 626(c)(2). *Roush v. KFC Nat. Management Co.*, 10 F. 3d 392 (6th Cir. 1993); *Fite v. First Tennessee Production Credit Ass'n*, 861 F. 2d 884 (6th Cir. 1988). Both of these decisions hold that the district court's "approval of the prospective damage award . . . as returned by the jury . . . was not an abuse of discretion." *Fite*, 861 F. 2d at 893; *Roush*, 10 F. 3d at 398 (emphasis omitted). This unusual phrasing suggests the jury's role may have been advisory. The courts of appeals are divided about whether in ADEA cases judges or juries should determine the amount of front pay.

In the third cited case, which arose under Title VII, the Sixth Circuit had directed the trial judge on remand to determine the amount of front pay. *Suggs v. Servicemaster Education Food Management*, 72 F. 2d 1228, 1234-35 (6th Cir. 1996).

The Sixth Circuit also suggested that front pay is part of compensatory damages, and subject to the section 1981a cap, because those limitations in section 1981a(b)(3) apply to "future pecuniary losses." *Hudson v. Reno*, 130 F. 3d at 1203. But this analysis simply ignores the words that precede the phrase: "future pecuniary losses" in subsection (b)(3): "The sum of the amount of *compensatory damages awarded under this section* for future pecuniary losses [and other listed items] shall not exceed [certain specified ceilings]." (Emphasis added). Section 1981a(b)(3) is not a limitation on the sum of *all* monetary awards in employment discrimination cases or even of all awards under Title VII, but is only a cap on the sum of certain specified elements of the "compensatory damages awarded under this section" together with any punitive damages. Subsection (b)(2) expressly defines what *are* "compensatory damages . . . under this section" to exclude all remedies authorized by section 706(g). Subsection (b)(3) in turn is simply a limit on the awards of compensatory damages as defined in subsection (b)(2). Because front pay is outside of "compensatory damages . . . under this section" by virtue of the subsection (b)(2) definition, it is not among the items limited by the subsection (b)(3) cap on "compensatory damages . . . under this section."

This limitation on the significance of subsection (b)(3) is illustrated by the existence in many race discrimination cases of claims under 42 U.S.C. § 1981. Compensatory and punitive damages have long been available to plaintiffs in section 1981 cases. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975). Section 1981 compensatory awards can be made for all of the injuries listed in subsection (b)(3)--future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. But the liability limitations in subsection (b)(3) are clearly inapplicable to a section 1981

claim, since that subsection caps only compensatory and punitive damages "awarded under this section", *i.e.* under section 1981a. Monetary relief under section 1981, like monetary relief under section 706(g), is unaffected because it simply is not awarded under section 1981a at all.

The Sixth Circuit suggested that the "future pecuniary losses" clause of subsection (b)(3) would be meaningless if it did not include front pay. *Hudson v. Reno*, 130 F. 3d at 1204. As the EEOC has correctly noted, however, the types of injuries that constitute future pecuniary losses subject to the subsection (b)(3) caps are the same as the past pecuniary losses which the subsection does not cap: "[p]ecuniary losses include, for example, moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct."[24] These are precisely the types of pecuniary losses repeatedly cited in the legislative history of the 1991 Act as examples of injuries that would for the first time be redressed if Title VII were amended to authorize compensatory damages.[25]

II. THE LEGISLATIVE HISTORY OF SECTION 1981a DEMONSTRATES THAT CONGRESS DID NOT INTEND TO TREAT FRONT PAY AS PART OF COMPENSATORY DAMAGES

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[24] EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, II A (1), *reprinted in* EEOC Compliance Manual, N: 6071, N: 6078 (footnote omitted).

[25] H.R.Rep. 102-40(I), pp. 65, 67, 74; H.R. Rep. 102-40 (II), p. 25; H.R.Rep. 101-644 (part 1), pp. 38, 76; H.R.Rep. 101-644 (part 2), p. 32; S. Rep. 101-315, p. 30.

The manner in which subsections (b)(2) and (b)(3) were framed, and the larger context of the protracted legislative process leading to the adoption of the 1991 Act, make clear that Congress intended that all monetary relief already available under section 706(g), including front pay, be outside the scope of the compensatory damages authorized (and capped) by that Act. Over the course of almost two years of at times rancorous debate, proposals and counter-proposals, no faction ever proposed treating front pay as part of compensatory damages; for the reasons set out below, classifying front pay as damages would have had consequences which neither side would have wanted.

A provision for compensatory and punitive damages was included in the first version of the bill, offered in February 1990 by Senator Kennedy.[26] Section 8 of S. 2104 would have amended section 706(g) by adding at the end of that section language authorizing awards of compensatory and punitive damages, and providing for jury trials where those remedies were sought. The proposed new provision stated expressly that the compensatory damages were "in addition to the relief authorized by the preceding sentences of the subsection [706(g)]" and that compensatory damages did "not include backpay or any interest thereon." Although other provisions of S. 2104 were modified in committee or on the floor of the Senate in 1990, this language remained unchanged during that year. In 1990 the House and Senate each passed civil rights bills, and then approved by substantial majorities a modified bill adopted by the conference committee. All three of the bills approved in 1990 contained the same section 8 that had been included in the original version of S. 2104, stating that the compensatory damages were "in addition to" remedies authorized by section 706(g).

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[26] S. 2104, 101st Cong., 2d Sess.

Both the House and Senate reports in 1990 explained that the scope of compensatory damages under section 8 was limited to avoid "the possibility of duplicative recoveries."[27] The committees anticipated that juries would ordinarily be determining the amount of any compensatory damages, while judges would continue to award whatever monetary relief was already authorized by section 706(g). A limitation on the scope of compensatory damages was thus needed to assure that juries were instructed in a manner which assured that they did not, as part of those damages, provide redress for wage or other claims being redressed by the court. Because the bills approved by the House and Senate in 1990 had no cap on compensatory damages, there were no provisions analogous to subsection (b)(3). In that context, the section 8 limitation on the scope of compensatory damages served to protect the interests of employers in avoiding double recovery. Although a substantial minority of Congress was adamantly opposed to authorizing compensatory damages in Title VII actions, those opponents quite understandably expressed no objection to this limitation on the scope of compensatory damages or to its anti-duplication purpose.

Congressional opponents of section 8 argued that the size of potential compensatory or punitive awards might bankrupt employers, or coerce them into unwarranted settlements, and asserted that juries were likely to make excessive awards.[28] But neither side in the controversy would have wanted section 8 compensatory damages to include front pay. Section 8 opponents would have resisted any such proposal because it would have meant that the juries which

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[27] H.R. Rep. 101-644 (part 2), p. 36; S. Rep. 101-315, p. 55.

[28] The congressional debates about the wisdom of authorizing jury trials are summarized in the Reply Brief for Petitioner, *Kolstad v. American Dental Association*, No. 98-208, pp. 9-17.

they so distrusted, in addition to determining the amount of the newly authorized relief, could also decide the amount of an award that had previously been determined by a judge. Section 8 supporters never expressed any desire to shift that responsibility from judges to juries, and would have understood that such a proposal would have increased considerably the opposition to their proposal for a new remedy. The justifications for section 8 in the committee reports, floor debates and congressional hearings dealt exclusively with the need to provide additional monetary relief; no suggestion was ever made that remedies already being administered by judges needed to be determined by juries instead.

On repeated occasions in 1990 and 1991, section 8 opponents offered alternative legislative proposals, particularly in response to arguments that then existing law did not provide a significant remedy in harassment cases. At no time, however, did the opponents propose limiting already available monetary relief. During the Senate and House debates, respectively, Senator Kassebaum and Representative Michel offered amendments to the civil rights bill that would have permitted judges in harassment cases to award up to $100,000 in "additional equitable relief."[29] This new monetary remedy was as a practical matter limited to those harassment cases in which front pay could not be awarded.[30]

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[29] 136 Cong. Rec. 17685-66 (remarks of Sen. Dole); 136 Cong. Rec. 22148-19 (remarks of Rep. Michel).

[30] Both amendments provided that the "additional equitable relief" could not be awarded in any case in which back pay could be awarded. Front pay is by definition a continuation after the date of judgment of the back pay relief provided for losses prior to that date. As a practical matter the only type of discrimination covered by the Kassebaum and Michel proposals was harassment that had not resulted in a dismissal, demotion, or other loss of pay. The

Thus, although under these proposals there was a specific dollar limit on the amount that could be awarded by the trial judge, it was only a limit on the amount of that "additional" relief. Both the Michel and Kassebaum amendments were defeated.

President Bush vetoed the bill which had been approved by Congress in 1990. Included with his veto message was a new proposed alternative to section 8, which again supplemented but did not displace or limit already existing remedies under section 706(g). Unlike the Kassebaum and Michel amendments, the Bush proposal for "additional equitable relief" was not restricted to cases of harassment, but applied to any case of "intentional discrimination." The permissible additional remedy under the Bush alternative was raised to $150,000, but it could be awarded only "if the court finds . . . that an additional equitable remedy beyond those otherwise available is needed."[31] The President's veto message stated expressly that this award of up to $150,000 would be "in addition to existing remedies under Title VII."[32] The President's veto was sustained by the Senate.

When the new Congress convened in early 1991, legislation essentially similar to the vetoed bill was reintroduced; the relevant provisions of section 8 remained

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sponsors described their proposals in precisely those terms.

[31] Message from The President of the United States Transmitting Alternative Language to S. 2104 As Passed by The Congress, pp. 9-10(1990).

[32] Message from The President of The United States Returning Without My Approval S. 2104, The Civil Rights Act of 1990, p. 1.

unchanged.[33] In March of that year Senator Dole and Representative Michel introduced their own civil rights proposals, with identical provisions for additional monetary relief.[34] Unlike the Bush proposal, the Dole and Michel bills were limited to harassment cases but, unlike the earlier Kassebaum and Dole amendments, were not restricted to cases in which no other monetary relief could be awarded. As was true of the Kassebaum, Bush and previous Michel proposal, these proposals again provided that the relief was to be awarded by the court, rather than by a jury, and the proposals labeled the new monetary relief "equitable." Judges were limited to ordering "equitable monetary awards" of no more than $150,000, but this was expressly "in addition to ordering appropriate equitable relief under subsection (g) of this section", and was permissible only "if the court finds that an additional equitable remedy beyond those available under subsection (g) of this section is justified."[35]

On June 4, 1991, the House rejected the Michel proposal, and the next day again passed a civil rights bill including the same section 8 that had been approved in 1990. The margin of passage, however, was insufficient to overcome another presidential veto. Although supporters and opponents of the legislation differed on a number of issues, in one respect their positions were congruent--supporters had never proposed permitting a jury to determine the amount of the monetary relief already available under section 706(g), and opponents had never proposed imposing a limitation on

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[33] H.R. 1, 102d Cong., 1st Sess.

[34] H.R. 1375, 102d Cong., 1st Sess.; S. 611, 102d Cong., 1st Sess.

[35] H.R. 1375, § 8(b)(m); S. 611, § 8(b)(m).

section 706(g) awards--awards that had long included front pay.

On June 4, 1991, Senator Danforth introduced a package of legislation[36] which ultimately became the basis for the bill enacted into law in the fall of 1991. The compromise proposal regarding monetary relief was contained in S. 1209, which, like the bills that had previously passed both houses, authorized compensatory damages and jury trials, but which, like the earlier Kassebaum, Bush, Dole and Michel proposals, placed a limitation on the amount of this new relief. S. 1209, as was true of the final legislation, took the form of a new section 1981a, rather than an amendment to section 706(g). Subsection (b)(2) of the proposed amendment, excluding from the definition of compensatory damages all "relief authorized under section 706(g)," was identical to the terms of subsection (b)(2) that ultimately became law, and remained unchanged through several subsequent new bills.[37] Subsection (b)(3) of S. 1209 imposed a cap on compensatory damages, but, unlike the law ultimately adopted, the cap did not apply to future pecuniary losses.[38]

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[36] Danforth introduced at the same time S. 1207 and S. 1208, the provisions of which, in their original or amended form, became the basis of other portions of the 1991 Act.

[37] In S. 1209 this subsection is headed "Exclusions"; in the final bill the heading is "Exclusions from compensatory damages." This difference is devoid of significance.

The language of subsection (b)(2) appears to have been drawn from the competing prior proposals. The specific exclusion of backpay and interest on backpay was in section 8 of the bills that had previously passed the House and Senate; the generic reference to any other relief "under section 706(g)" mirrors similar language in the Dole and Michel 1991 proposals.

[38] The cap applied to "[t]he amount of compensatory damages awarded under this section against a respondent who is not a government, government agency, or political subdivision, for

Compensatory damages under S. 1209 assuredly would not have included front pay. The language now in subsection (b)(3), on which the Sixth Circuit later relied, was not in the bill. The only consequence that would have attached to treating front pay as part of compensatory damages under S. 1209 would have been that juries, not judges, would have decided whether to make such awards and how large they should be. Such a procedure would have been highly objectionable to the anti-jury opponents of the old section 8, and for that reason had never been suggested by the supporters of the bills which earlier had passed the House and Senate. It is unimaginable that Senator Danforth would have included in what he intended as a compromise proposal a deal-breaking provision that neither side had ever sought.

On June 27, 1991, Senator Danforth, after extended negotiations with the Bush Administration, introduced a new set of bills with more than twenty changes that had been made at the behest of the Administration. The first paragraph of subsection (b)(3) of S. 1409 was, with one exception not relevant here[39], identical to the language now in the first paragraph of section 1981a(b)(3). The significant change from S. 1209 was the inclusion of "future pecuniary losses" in the list of capped compensatory damages. Senator Danforth placed in the Congressional Record a memorandum explaining the "specific concerns [of the administration] and how they were addressed."

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emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." Later versions deleted the provision regarding government defendants, and extended the cap to cover the total of punitive and certain compensatory damages. The amount of the cap was also altered.

[39] In the version finally adopted by Congress this cap is on the award "for each complaining person."

The Administration requested a cap on future pecuniary damages.

Response: Cosponsors adopted such a cap.[40]

Nothing in this explanation suggests that the administration had sought, or that the cosponsors had adopted, an entirely new definition of "compensatory damages." Rather, the memorandum makes clear that subsection(b)(3) is exactly what it appears to be--a limitation on compensatory damages as previously defined in subsection (b)(2).

Although the language of subsections (b)(2) and (b)(3) did not change after June 27, S. 1409 and the companion compromise bills[41] did not fully resolve the controversy. Neither side at that point had accepted even the proposal regarding damages; other provisions, particularly regarding disparate impact claims, were the subject of another four months of negotiations. On September 24, 1991, Senator Danforth and six Republican Senators introduced S. 1745, which combined in a single bill the proposals, some further modified, that had been in S. 1407, S. 1408 and S. 1409. On October 25, 1991, agreement was reached on a final set of revisions to S. 1745. Most of these alterations related to the disparate impact provisions; the only non-technical change to the damage provision was a slight increase in the amount of caps.[42]

Five days later Senator Danforth and the original six Republican cosponsors of S. 1745 placed in the Congressional

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[40] 137 Cong. Rec. 16963 (1991).

[41] S. 1407 and S. 1408, 102d Cong. 1st Sess.

[42] In the case of employer with 201-500 employees, the cap was raised from $100,000 to $200,000. Compare S. 1745 §5(b)(3) with 42 U.S.C. § 1981a(b)(3).

Record an "Interpretative Memorandum" regarding the meaning of the provisions of the bill other than the sections regarding disparate impact cases.[43] The Memorandum expressly was "intended to reflect the intent of all of the original cosponsors to S. 1745", an intent of particular significance with regard to subsections (b)(2) and (b)(3), because those provisions had remained unchanged since S. 1745 was first introduced[44]. The Memorandum stated:

> [T]he following limitations . . . are placed on the damages available to each individual complaining party for each cause of action brought under section 1981A:
>
> Such damages cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII:
>
> The amount of nonpecuniary damages, future pecuniary damages and punitive damages shall not exceed [the dollar limitation based on the size of the employer's workforce.][45]

As had been true of the committee reports on the bills passed in 1990 and 1991, the cosponsors continued to regard the exclusion of backpay and front pay from compensatory damages as a protection for defendants. These "limitations

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[43] An Interpretative Memorandum on that issue, agreed to by Senators Danforth, Dole and Kennedy, had been placed in the record earlier. 137 Cong. Rec. 28680.

[44] The six cosponsors of S. 1745 had earlier cosponsored S. 1209 and S. 1409.

[45] 137 Cong. Rec. 29046.

. . . on the damages available" restricted the items for which juries could award compensatory damages.

Senator Kennedy, in what was the first description of the final bill given after the October 25 compromise, expressly stated on the floor of the Senate that front pay was not part of compensatory damages.[46] A number of Senators who had opposed Kennedy's original bill, including Senator Hatch, disagreed with other portions of Kennedy's speech, particularly regarding disparate impact claims, and so offered in responsive speeches, and in a memorandum of their own, quite different interpretations of certain provisions of the compromise bill. These disagreements led Senator Danforth to offer, and the Senate to approve, an amendment to S. 1745 directing the courts to disregard any statements that had been made regarding "Wards Cove-Business necessity/ cumulation/alternative business practices"[47], all issues related to disparate impact claims. But despite the care with which the speeches of Kennedy and others had been scrutinized, and the alacrity with which Hatch and others rose to disavow any statement with which they disagreed, neither Hatch nor any other member of Congress expressed any disagreement with the insistence of Kennedy, Danforth and the original S. 1745

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[46] "Compensatory damages do not include backpay, interest on backpay, or any other type o[f] relief authorized under section 706(g) of the Civil Rights Act of 1964, including front pay." 136 Cong. Rec. 28637.

[47] 105 Stat. 1075. ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that related to Wards Cove--Business necessity/cumulation/alternative business practice.")

cosponsors that front pay was not part of compensatory damages.

When the bill reached the House, Representative Edwards placed in the Record a section-by-section analysis which, like the Danforth Memorandum, insisted that front pay was not part of compensatory damages.

> Damages awarded under section [1981a] cannot include remedies already available under Title VII including backpay, the interest thereon, front pay, or any other relief authorized under Title VII.[48]

Although Representative Hyde responded with a lengthy explanatory memorandum of his own[49], he did not assert that front pay was part of compensatory damages.

This lack of disagreement about the exclusion of front pay from compensatory damages reflected the fact that the exclusion served in two important ways to protect the interests of defendants. First, as the earlier committee reports had stressed, such an exclusion was needed to avoid duplicative recovery where a jury awarded compensatory damages and a judge awarded relief available under section 706(g). Second, the exclusion assured that a judge, not a jury, would continue to decide whether front pay should be awarded, and if so how much; that assurance was important to the erstwhile opponents of compensatory damages, who feared that juries were prone to award excessive amounts.

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[48] 137 Cong. Rec. 30661.

[49] 137 Cong. Rec. 30678-83.

III. TREATING FRONT PAY AS PART OF COMPENSATORY DAMAGES UNDER SECTION 1981a WOULD RAISE SERIOUS PROBLEMS FOR JUDICIAL ENFORCEMENT OF TITLE VII

Treating front pay as part of compensatory damages under section 1981a would interfere with enforcement of Title VII in a manner that Congress did not contemplate and could not have intended.

(1) Confronted as they are with a wide variety of remedial problems, the lower courts have utilized front pay orders to address a number of distinct problems, and have found it necessary to structure those orders in several different ways. The framing of a front pay order has required lower court judges to exercise discretion in four distinct ways.

First, the decision whether to award front pay is inextricably intertwined with the trial judge's decision regarding whether, and in what manner, to order reinstatement, promotion or hiring.[50] "The choice of a [front pay] remedy in lieu of an order that the plaintiff be reinstated rests in the sound discretion of the trial court." *Goss v. Exxon Office Systems Co.*, 747 F. 2d 885, 890 (3d Cir. 1984). Depending on the circumstances of a particular case, lower courts have chosen to order (i) immediate reinstatement, (ii) reinstatement after the completion of any appeals[51], (iii) reinstatement as soon as there is a vacancy in the position in

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[50] For simplicity we use the term reinstatement to refer to these various types of injunctive relief.

[51] *See Anderson v. Group Hospitalization, Inc.*, 820 F. 2d 465, 473 (D.C.Cir. 1987).

question[52], (iv) reinstatement after several vacancies have occurred, (v) promotion through a series of vacancies until the plaintiff reaches the position he or she would have held absent discrimination, to (vi) give the employer the choice of either reinstating the plaintiff or paying front pay[53], or to (vii) deny reinstatement. Only the first order ends the condition that gave rise to the back pay order and makes consideration of front pay unnecessary.

Front pay is often utilized as an interim measure where the discrimination victim cannot immediately be placed in the position to which he or she is entitled. Where there is no current vacancy in that position, the lower courts have generally avoided "bumping" an innocent employee in order to create a vacancy for the plaintiff, preferring to award front pay (subject to a variety of limitations and deductions) until a vacancy arises by attrition. See Appendix B. Courts also have frequently ordered front pay where reinstatement is impractical, *United States v. Burke*, 504 U.S. 229, 239 n. 9 (1992), such as where there is continuing animus towards the

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[52] *King v. Staley*, 849 F. 2d 1143, 1145 (8th Cir. 1988); *Pitre v. Western Elec. Co., Inc.*, 843 F. 2d 1262, 1279 (10th Cir. 1988); *Briseno v. Central Technical Community College Area*, 739 F. 2d 344, 348 (8th Cir. 1984); *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 269 (4th Cir.1976).

[53] *E.g., Carter v. Sedgwick County, Kan.*, 929 F. 2d 1501, 1505 (10th Cir. 1991); *Cross v. Board of Ed. of Dollarway, Ark. Sch. Dist.*, 395 F. Supp. 531, 535-36 (E.D.Ark. 1975).

plaintiff[54] or where the past discrimination has been so egregious that the plaintiff cannot return to work.[55]

Second, even where reinstatement has been denied or delayed, an award of front pay remains a matter of district court discretion. Front pay awards raise practical and equitable issues not posed by backpay claims. Trial judges direct such awards where they "will aid in ending illegal discrimination and rectifying the harm it causes." *Shore v. Federal Express Corp.*, 777 F. 2d 1155, 1159 (6th Cir. 1985).[56] In addition to making the discrimination victim whole, front pay may be awarded to insure the efficacy of a reinstatement order by providing the employer with a financial incentive to find a vacancy and reinstate the plaintiff

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[54] *Bruso v. United Airlines, Inc.*, 2001 WL 87635 *11 (7th Cir.); *Caudle v. Bristow Optical Co., Inc.*, 224 F. 3d 1014, 1019 (9th Cir. 2000); *Farley v. Nationwide Mutual Insurance Co.*, 197 F. 3d 1322, 1338 (11th Cir. 1999); *Green v. USX Corp.*, 843 F. 2d 1511, 1531 n. 17 (3d Cir. 1988); *Thorne v. City of El Segundo*, 802 F. 2d 1131, 1137 (9th Cir. 1986); *Shore v. Federal Express Corp.*, 777 F. 2d 1135, 1159 (6th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F. 2d 885, 890 (3d Cir. 1984); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984)(opinion by Kennedy, J.).

There is significant empirical evidence that dismissed employees who return to work pursuant to court ordered reinstatement do not long survive in those jobs. Susan Grebeldinger, "*The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay*", 1996 U.Ill.L.Rev. 319, 340-42.

[55] *Farley v. Nationwide Mutual Insurance Co.*, 197 F. 3d 1322, 1338 (11th Cir. 1999); *Gotthardt v. National R.R. Passenger Corp.*, 191 F. 3d 1148, 1152, 1155 (9th Cir. 1999); *Ramos v. Davis & Geck, Inc.*, 167 F. 3d 727, 733 (1st Cir. 1999).

[56] *See Nord v. United States Steel Corp.*, 758 F. 2d 1462, 1473-74 (11th Cir. 1985); *Thompson v. Sawyer*, 678 F. 2d 257, 292 (D.C.Cir. 1982).

as soon as possible.[57] Conversely, although denials of backpay are uncommon once the court finds that a violation caused a loss of income, district courts awarding backpay have for a variety of reasons declined also to award front pay as well, and the appellate courts have generally deferred to such trial court decision where it was exercised in a manner consistent with *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). See Appendix C.

Third, if front pay is to be awarded, the trial court must decide what form that award will take. The court may order that the victim be paid a particular wage (often subject to various deductions) until the occurrence of a given event, such as the offer of or appointment to a given position, the date on which the employee would have retired, or simply the passage of a given number of years.[58] These wages are paid out periodically until the specified cutoff point, and are subject to ongoing modification by the court. Only a judge could frame such a decree; "juries don't draft injunctions." *Pals v. Schepel & GMC Truck, Inc.*, 220 F. 3d 495, 500 (7th Cir. 2000). In the alternative, the court may order payment

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[57] *E.g.*, *Johnson v. Chapel Hill Independent School Dist.*, 853 F. 2d 375, 382 (5th Cir. 1988); *James v. Stockham Valves & Fittings Co.*, 559 F. 2d 310, 358 (5th Cir. 1977); *EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579, 590-91 (2d Cir. 1976).

[58] *E.g.*, *Shore v. Federal Express Corp.*, 42 F. 3d 373, 377-89 (6th Cir. 1994); *Anderson v. Group Hospitalization, Inc.*, 820 F. 2d 465, 473 (D.C.Cir. 1987); *Polk v. Yellow Freight System, Inc.*, 801 F. 2d 190, 192 n. 2 (6th Cir. 1986); *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F. 2d 599, 603 (7th Cir. 1985); *Day v. Wayne County Bd. of Auditors*, 749 F. 2d 1199, 1201 (6th Cir. 1984); *Briseno v. Central Technical Community College Area*, 739 F. 2d 344, 348 (8th Cir. 1984). A detailed argument for this form of front pay is set out in *Stafford v. Electronic Data Systems Corp.*, 749 F. Supp. 781, 787-92 (E.D.Mich. 1990).

of a single lump sum, which represents the discounted value of a hypothetical income stream.[59] Lump sum payments require a degree of prediction about future events (how wage rates would have changed, how much the employee would have earned from any other employment, etc.), but do not require ongoing judicial scrutiny of the employer's actions. Courts may also retain jurisdiction over the case, and periodically order additional monetary relief for the period since the last such order; in that instance these subsequent retrospective orders are referred to as backpay.[60]

Fourth, trial judges have properly been accorded a broad degree of discretion in determining the amount of a front pay award.[61]

(2) If in a particular case an award of front pay were precluded by the subsection (b)(3) caps, that would compel the trial judge to reconsider his or her decision to utilize front pay rather than enter an injunction directing immediate reinstatement.

Prior to the 1991 Civil Rights Act, and today in circuits other than the Sixth, a judge's decision about whether

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[59] *E.g.*, *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F. 2d 945, 956 (10th Cir. 1980); see n. 16, *supra*.

[60] *E.g.*, *Suggs v. Servicemaster Educ. Food Management*, 72 F. 3d 1228, 1235 and n. 4 (6th Cir. 1996); *James v. Stockham Valves & Fittings Co.*, 559 F. 2d 310, 368 (5th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 269 (4th Cir. 1976).

[61] *Proctor v. Consolidated Freightways Corp. of Delaware*, 942 F. 2d 793 (table), 1991 WL 170024 *5 (9th Cir. 1991); *Carter v. Sedgwick County, Kan.*, 929 F. 2d 1501, 1505 (10th Cir. 1991); *Johnson v. Chapel Hill Independent School Dist.*, 853 F. 2d 375, 382-83 (5th Cir. 1988); *Goss v. Exxon Office Systems Co.*, 747 F. 2d 885, 891 (3d Cir. 1984).

to order reinstatement is a choice between two alternatives, since if the judge rejects reinstatement he or she can then turn to the option of front pay. Under the Sixth Circuit rule, however, a judge in a jury trial would have to make a tentative decision about reinstatement without knowing whether front pay might later be precluded because of the statutory cap. If a jury's compensatory and punitive award in turn precluded front pay, the court would properly need to reassess its decision to deny reinstatement; a court might choose in advance of the jury verdict to award reinstatement, rather than opt for the front pay option and run the risk that the caps would preclude such relief.

The actual or potential unavailability of front pay could thus lead judges to order reinstatement, or immediate rather than eventual reinstatement, in circumstances where they sensibly would have chosen to act otherwise prior to the Sixth Circuit rule in *Hudson v. Reno*. In cases where no vacancy existed, such a reinstatement order might require bumping; the result of the cap would thus be to shift from the culpable employer to an innocent incumbent employee the cost of redressing the proven discrimination. If a court were to order reinstatement despite palpable animus towards a plaintiff, that would often lead to a new set of violations, a second round of litigation, and another award of back pay and compensatory and punitive damages--consequences that would ill serve the interests of either the employer or the employee.[62]

In the alternative, a court which wanted to provide monetary relief could apparently avoid the problem created by

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[62] *See Bruso v. United Airlines, Inc.*, 2001 WL 87635 *11 (7th Cir.)(front pay the preferable remedy where reinstatement would "cause the court to become embroiled in each and every employment dispute that arose between the plaintiff and the employer following the plaintiff's reinstatement.")

the caps simply by retaining jurisdiction and making periodic, retrospective awards of back pay.

(3) The potential application of the subsection (b)(3) caps to front pay would create perverse incentives for defendants. First, in a case where discriminatory officials know that they have already caused damages equal to or greater than the statutory limitation, they could without cost prevent the reemployment of the victim by creating working conditions so intolerable that the victim would not want or be able to return to work. Prior to the adoption of the 1991 Act there was a distinct disincentive for such behavior; even if the victim did not return to work, she or he would at least receive front pay. But the Sixth Circuit rule gives discriminatory officials a new ability to abuse their victim; they could not only drive her from work, but also guarantee that she be financially worse off, if not impoverished, long after an inadequate final judgment left her without either front pay or a job. At current interest rates, the maximum $300,000 damage judgment would generate only about $15,000 a year, often far less than many victims were making or could have obtained in front pay prior to the 1991 Act. In the instant case, for example, petitioner was earning $60,000 annually at DuPont. (Tr. 141). In a case such as this, where the culpable officials acted with a palpable desire to injure petitioner, the Sixth Circuit rule assures the perpetrators that the courts will be powerless to prevent that scheme of abuse from succeeding.[63]

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[63] *See EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F. 2d 1225, 1232 (10th Cir. 1984)(if front pay were not available, "an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return."

Second, the Sixth Circuit rule provides a powerful incentive for an employer to refrain from taking corrective measures. This Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), construed Title VII to encourage preventative and remedial action. In a wrongful dismissal case such as this prior to the 1991 Act, a defendant employer in the Sixth Circuit would have had good reason to remedy the sort of abusive conditions that existed in this case; absent such corrective measures, a court would likely find reinstatement impracticable and order front pay. But if an employer realizes that front pay will be precluded because of the damage cap, it can with impunity leave those conditions unredressed. Indeed, an employer which wanted to prevent a victim from returning to work could do so with financial impunity simply by permitting the hostile work environment to persist.

Under the Sixth Circuit rule, an employer which engaged in actionable but not egregious harassment, and an employer which took effective corrective action once it learns of abuses, will be subject to a reinstatement order. But under that rule an employer can, without cost, prevent reinstatement by engaging in particularly severe harassment or by refusing to take actions that would end the hostile environment that had driven a victim from her job. An avowed purpose of the 1991 Civil Rights Act was to deter intentional discrimination. 105 Stat. 1071. The Congress which adopted that Act assuredly did not intend to create incentives that would encourage the worst forms of abuse and reward employers which did the least to correct them.

(4) If, as the Sixth Circuit held, front pay is a form of compensatory damages, then front pay awards would have to be made by a jury whenever a party requested a jury trial.

Because of the nature of front pay, such a scheme would raise serious practical problems.

The Sixth Circuit appears to have assumed that where reinstatement is denied, the determination of *whether* to award front pay will be made by the judge, with the jury relegated to deciding the amount of the front pay. *Hudson v. Reno*, 130 F. 3d at 1203-04. But if front pay *is* compensatory damages, surely the decision whether to make such an award will have to be made by the jury in any case in which a jury is requested. The decision whether to award damages is always a jury issue in a jury trial. Unlike front pay, which judges have discretion to deny, compensatory damages must be awarded for an injury caused by an employer's violation of Title VII. Thus classifying front pay as compensatory damages would often make such awards mandatory rather than discretionary, and would shift from judges to juries the responsibility for determining whether such an award should be made.

The possibility of awarding front pay only arises after the court has decided whether or not to order reinstatement, either at once or at all. If a jury were to be responsible for awarding front pay, the court's decision to grant, deny or postpone reinstatement would have to be made between the end of closing arguments and the instruction of the jury. In an ordinary trial those two events occur in immediate succession. But the granting and framing of injunctive relief requires the court to carefully review the evidence, often with the assistance of briefs and a transcript, and the trial judge is at times obligated to provide on the record an explanation of the basis of his or her decision.[64] If the appropriateness of

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[64] In a number of instances appellate courts have overturned trial judge decisions in favor of front pay or reinstatement because the lower court had not explained its action. *E.g.*, *EEOC v. W &*

reinstatement were in dispute, judges would have to choose between either (a) making in a few minutes or hours decisions about injunctive relief that in the past were made only after considered reflection, or (b) recessing the trial for days or weeks while the matter of reinstatement was resolved.

The decision whether (and if so, how) to order reinstatement itself requires the trial judge to make factual findings about the events which gave rise to the action, and perhaps about the currently prevailing conditions at the worker's old job. These will often be among the very factual issues in contention with regard to the merits of the underlying action. If, for example, a plaintiff alleged she had been sexually abused by her boss and then fired because of her gender, reinstatement might be perfectly appropriate if the second allegation were proven, but not if the first one were sustained. Under the practice prevailing outside the Sixth Circuit, a jury first makes such liability determinations; the court can in turn rely on those findings in determining reinstatement, and then front pay. But if the court must resolve reinstatement issues before a case goes to the jury, then the judge would often have to make his or her own determination of the merits of the action prior to charging the jury, a practice precluded by *Beacon Theaters v. Westover*, 359 U.S. 500 (1959).[65] The only solution to these related procedural problems would be a trifurcated procedure, under which (a) the jury makes a determination of liability, (b) the

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O, Inc., 213 F. 3d 600, 619 (11th Cir. 2000); *Farley v. Nationwide Mutual Insurance Co.*, 197 F. 3d 1322, 1338 (11th Cir. 1999); *Rutherford v. Harris County, Texas*, 197 F. 3d 173, 187-88 (5th Cir. 1999).

[65] *See Pals v. Schepel & GMC Truck, Inc.*, 220 F. 3d 495, 500 (7th Cir. 2000)(in resolving issues regarding reinstatement or front pay trial judge must defer to factual determinations of jury).

trial judge next makes a considered determination about reinstatement in light of those findings, and if reinstatement is denied or postponed then (c) the jury is reconvened to make a decision about front pay.

Where the decisions have been made both to deny reinstatement and to award front pay, a determination must next be made whether the award should be a lump sum, or should take the form of an order that the employer make periodic payments until a given date (e.g., reinstatement) subject to specified conditions (e.g., so long as the employee is still looking for work) and under continuing supervision by the court. It is difficult to see how a jury would be capable of choosing between these two types of front pay, or how it could frame a periodic payment order. A periodic payment order is essentially an injunction, and would have to be fashioned by a judge. Since such an order assuredly would be equitable, this form of front pay at least would not be compensatory damages and would necessarily fall outside the subsection (b)(3) cap.

Finally, if judges were to decide whether front pay should be awarded, but juries were to fix the amount, there would be a substantial risk that those decisions would be based on conflicting views of the evidence[66]; a judge could not

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[66] *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F. 2d 1249, 1257 (2d Cir. 1987):

> "There is much overlap between the facts relevant to whether an award of front pay is appropriate and those relevant to the size of the award. For example, both questions turn in part on the ease with which the employee will be able to find other employment. To divide the fact-finding responsibilities in such circumstances would be anomalous and would risk inconsistent decisions. A jury might conclude that the employee would never find other work and award a large sum in

direct the jury to accept his or her assessment of the evidence without violating *Beacon Theaters*. Moreover, although in the case of a lump sum award a decision about the amount of money a plaintiff could have expected to earn but for the proven discrimination may be a manageable fact-specific prediction, the determination about the length of time for which front pay should be awarded is an intensely discretionary choice regarding which trial judges have traditionally been accorded broad latitude. Such equitable discretion is at odds with the traditional role of juries in determining compensatory damages.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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front pay, while the judge found that he or she would find work immediately and that no award was appropriate. Or a judge might find front pay appropriate, but the jury might award only a nominal sum based on its belief that the employee could secure immediate employment."

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APPENDIX A

TITLE VII FRONT PAY CASES DECIDED BY THE COURTS OF APPEALS PRIOR TO THE ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991

Proctor v. Consolidated Freightways Corp. of Delaware, 942 F. 2d 793 (table), 1991 WL 170024 *4-*5 (9th Cir. 1991)(affirming award of front pay)

Carter v. Sedgwick County, Kan., 929 F. 2d 1501, 1505 (10th Cir. 1991) (directing modification of district court's front pay order)

Weaver v. Casa Gallardo, Inc., 922 F. 2d 1515, 1528-29 (11th Cir. 1991) ("prevailing Title VII plaintiffs are presumptively entitled to either reinstatement or front pay")

Barbano v. Madison County, 922 F. 2d 139, 146 (2d Cir. 1990)

Hopkins v. Price Waterhouse, 920 F. 2d 967, 981 (D.C.Cir. 1990)

Simmons v. Marsh, 917 F. 2d 23 (table), 1990 WL 163059 *4 (4th Cir. 1990)("The great weight of authority denies compensatory and punitive damages under Title VII because the statute provides only for equitable relief in the form of back pay, front pay, remedial seniority, injunctions and declaratory relief")

Sellers v. Delgado Community College, 902 F. 2d 1189, 1196 (5th Cir. 1990)

Edwards v. Occidental Chemical Corp., 892 F. 2d 1442, 1448-49 (9th Cir. 1990)

Lander v. Lujan, 888 F. 2d 153, 159 (D.C.Cir. 1989)(Ginsburg, J., concurring)("the 'rightful place' approach, when it is coupled with a 'front pay' award, is sometimes the more appropriate remedy")

Brooms v. Regal Tube Co., 881 F. 2d 412, 424 n. 9 (7th Cir. 1989)

EEOC v. General Lines, Inc., 865 F. 2d 1555, 1564 (10th Cir. 1989)

Erebia v. Chrysler Plastic Products Corp., 863 F. 2d 47 (table), 1988 WL 125356 *1-*3 (6th Cir. 1988)("[t]he normal practice is to award front pay in those situations where reinstatement is not appropriate"), *see* Erebia v. Chrysler Plastic Products Corp., 891 F. 2d 1212, 1213-14 (6th Cir. 1989)

Johnson v. Chapel Hill Independent School Dist., 853 F. 2d 375, 381-82 (5th Cir. 1988)("In appropriate circumstances . . . front pay may be awarded")

King v. Staley, 849 F. 2d 1143, 1144-45 (8th Cir. 1988)(reversing district court denial of front pay)

Floca v. Homcare Health Services, Inc., 845 F. 2d 108,112 (5th Cir. 1988)("Front pay is awarded to meet the goal of Title VII to make whole the victims of discrimination")

Green v. USX Corp., 843 F. 2d 1511, 1531 (3d Cir. 1988)("The decision to award front pay as relief in Title VII cases rests certainly within the discretion of the trial court")

Pitre v. Western Elec. Co., Inc., 843 F. 2d 1262, 1278 (10th Cir. 1988)("Front pay is a substitute for immediate promotion which cannot occur because there are no positions currently available")

Spears v. Board of Educ. of Pike County, Ky., 843 F. 2d 882, 885-86 (6th Cir. 1988)(remanding to district court for recalculation of front pay)

Anderson v. Group Hospitalization, Inc., 820 F. 2d 465, 473 (D.C.Cir. 1987)(affirming award of front pay)

Sellers v. Delgado Community College, 839 F. 2d 1132, 1141 (5th Cir. 1988)

Thorne v. City of El Segundo, 802 F. 2d 1131, 1137 (9th Cir. 1986)("Awards of front pay are appropriate when it is impossible to reinstate the plaintiff")

Pecker v. Heckler, 801 F. 2d 709, 713 and n. 8 (4th Cir. 1986)("Our prior cases have embraced the concept of awarding front pay as part of a make whole remedy for employment discrimination")

Sellers v. Delgado Community College, 781 F. 2d 503, 505 (5th Cir. 1986)(authorizing district court to award front pay on remand)

Shore v. Federal Express Corp., 777 F. 2d 1155, 1159-60 (6th Cir. 1985)(front pay to be awarded in Title VII cases

where it "will aid in ending illegal discrimination and rectifying the harm it causes")

Nord v. United States Steel Corp., 758 F. 2d 1462, 1473 (11th Cir. 1985)("As an alternative to reinstatement, the court could have ordered front pay")

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F. 2d 599, 603 (7th Cir. 1985)

Day v. Wayne County Bd. of Auditors, 749 F. 2d 1199, 1201 (6th Cir. 1984)

Goss v. Exxon Office Systems Co., 747 F. 2d 885, 890 (3d Cir. 1984)("The award of future lost earnings in Title VII cases is an alternative to the traditional equitable remedy of reinstatement.")

Dillon v. Coles, 746 F. 2d 998, 1006 (3d Cir. 1984)

Fadhl v. City and County of San Francisco, 741 F. 2d 1163, 1167 (9th Cir. 1984)

Briseno v. Central Technical Community College Area, 739 F. 2d 344, 348 (8th Cir. 1984)(broadening front pay order of district court)

Ingram v. Madison Square Garden Center, Inc., 709 F. 2d 807, 813 (2d Cir. 1983)

Carpenter v. Stephen F. Austin State U., 706 F. 2d 608, 632 n. 14 (5th Cir. 1983)("Front pay is a recognized form of Title VII compensation")

Thompson v. Sawyer, 678 F. 2d 257, 292-93 (D.C.Cir. 1982)("Awards of front pay are to be judged by the standards applied to all Title VII relief: whether they will further the goals of ending illegal discrimination and rectifying the harm it causes")

Association Against Discrimination v. City of Bridgeport, 647 F.2d 256, 269 n. 9 (2d Cir. 1981)(affirming award of front pay)

EEOC v. Safeway Stores, Inc., 634 F. 2d 1273, 1381-82 (10th Cir. 1980)(front pay approved by *Franks v. Bowman Transportation, Inc.*)

Falcon v. General Tel. Co. of Southwest, 626 F. 2d 369, 383-84 and n. 22 (5th Cir. 1980)

United States v. Lee Way Motor Freight, Inc., 625 F. 2d 918, 932 (10th Cir. 1979)

Fitzgerald v. Sirloin Stockade, Inc., 624 F. 2d 945, 956 (10th Cir. 1980)(affirming award of front pay)

Kamberos v. GTE Automatic Elec., Inc., 603 F. 2d 598, 603 (4th Cir. 1979)

Hill v. Western Elec. Co., 596 F. 2d 99, 104 (4th Cir. 1979)(affirming award of front pay)

White v. Carolina Paperboard Corp., 564 F. 2d 1073, 1091 (4th cir. 1977)(backpay may be supplemented "by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position," *quoting Patterson v. American Tobacco*)

James v. Stockham Valves & Fittings Co., 559 F. 2d 310, 357-58 (5th Cir. 1977)("We agree that there are cases in which [front pay] is appropriate")

EEOC v. Enterprise Ass'n Steamfitters, 542 F. 2d 579, 590-91 (2d Cir. 1976)("backpay" to continue until victims appointed to jobs they would have held but for discrimination)

Patterson v. American Tobacco Co., 535 F. 2d 257, 267-70 (4th Cir. 1976)("backpay" must continue after judgment until discrimination victims reach jobs they would have held but for proven discrimination)

APPENDIX B

DECISIONS FAVORING FRONT PAY TO AVOID "BUMPING" AN INNOCENT INCUMBENT EMPLOYEE

Doll v. Brown, 75 F. 3d 1200, 1207 (7th Cir. 1996)

Walsdorf v. Board of Commissioners for the East Jefferson Levee District, 857 F. 2d 1047, 1053 (5th Cir. 1988)

King v. Staley, 849 F. 2d 1143, 1145 (8th Cir. 1988)

Patterson v. American Tobacco Co., 535 F. 2d 257, 266-69 (4th Cir. 1976)

Gobert v. Babbitt, 2000 WL 1876254 *2 (E.D.La.)

Moore v. University of Notre Dame, 22 F. Supp. 2d 896, 904 (N.D.Ind. 1998)

Roy v. The Austin Co., 1998 WL 544411 *5 (N.D.Ill.)

Paul v. CMC Manufacturing, Inc., 1998 WL 527102 *1 (N.D.Miss.)

Colwell v. Suffolk County Police Dept., 967 F. Supp. 1419, 1433 (E.D.N.Y. 1997)

Kraemer v. Franklin and Marshall College, 941 F. Supp. 479, 482 (E.D.Pa. 1996)

Mitchell v. Sisters of Charity of the Incarnate Word, 924 F. Supp. 793, 803-04 (S.D.Tex. 1996)

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Reilly v. Cisneros, 835 F. Supp. 96, 99 (W.D.N.Y. 1993)

Hicks v. Dothan City Bd. of Ed., 814 F. Supp. 1044, 1050 (M.D.Ala. 1993)

McCann v. Litton Systems, Inc., 767 F. Supp. 127, 130 (S.D.Miss 1991)

Essa v. Hartford Fire Insurance Co., 1991 WL 255111 *11 (N.D.N.Y.)

Willis v. Watson Chapel School District, 749 F. Supp. 923, 923 (E.D.Ark. 1990)

Valdez v. Church's Fried Chicken, 683 F. Supp. 596, 636 (W.D.Tex. 1988)

Boyd v. SCM Allied Paper Co., 1986 WL 15558 *13 (N.D.Ill.)

Jackson v. Alterman Foods, Inc., 1985 WL 6430 *1 (N.D.Ga.)

Ivey v. Western Electric Co., 1978 WL 42 *7 (N.D.Ga. 1978)

White v. Carolina Paperboard, 1975 WL 250 *8 (W.D.N.C.)

APPENDIX C

DECISIONS HOLDING DISTRICT COURT DENIAL OF FRONT PAY NOT AN ABUSE OF DISCRETION

Bruso v. United Airlines, Inc., 2001 WL 87635 *13 (7th Cir.)(plaintiff failed to offer sufficient evidence of how long he would have remained with the employer)

Excel Corp. v. Bosley, 165 F. 3d 635, 639-40 (8th Cir. 1999)(plaintiff had failed to mitigate damages)

Sellers v. Delgado Community College, 902 F. 2d 1189, 1196 (8th Cir. 1990)(plaintiff had persistently failed to mitigate damages by seeking other employment)

Brooms v. Regal Tube Co., 881 F. 2d 412, 424 n. 9 (7th Cir. 1989)(plaintiff failed to offer evidence regarding front pay)

Erebia v. Chrysler Plastic Products Corp., 863 F. 2d 47 (table), 1988 WL 125356 *2-*3 (6th Cir. 1988)(plaintiff had sexually harassed several subordinates)

Floca v. Homcare Health Services, Inc., 845 F. 2d 108, 112 (5th Cir. 1988)(plaintiff had left nursing profession to enter law school)

Dillon v. Coles, 746 F. 2d 998, 1006 (3d Cir. 1984)(unlikely rejected applicant would have remained an employee very long)

MAR 23 2001

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Supreme Court, U.S.
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No. 00-763

IN THE -

Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company. There are presently 14 publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada Inc. is a consolidated subsidiary, and the following companies are companies in which DuPont holds a minority, non-controlling interest:

Bionova Holding Corporation
Celgene Corporation
DuPont Photomasks, Inc.
Hologic, Inc.
Hudson Technologies, Inc.
ImproveNet, Inc.
Kos Pharmaceuticals, Inc.
Maxygen Inc.
SciQuest.com
Shaman Pharmaceuticals Inc.
Syncor International Corporation
Trigon Healthcare, Inc.
WebMD Corporation

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E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

INTRODUCTION

Statutory Scheme

The civil rights acts of the last 50 years have grown to a complex and even intricate corpus of law. The Civil Rights Act of 1964 ("Act")[1] largely limited remedies to injunctive and affirmative action relief under Title VII. *See* Pub. L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259. Reinstatement and back pay were included as one of the potential remedies. *Id.* "Front pay" is neither defined nor even used in the statute.

The Equal Employment Opportunity Act of 1972 added the language "any other equitable relief," essential to the resolution of this case to section 706. Pub. L. 92-261 § 4, Mar. 24, 1972, 86 Stat. 104. Nevertheless, Title VII remedies remained equitable in nature. *United States v. Burke*, 504 U.S. 229, 238 (1992).

[1] Covers 1964 Act and amendments, except when specifically noted.

A dramatic change occurred with the passage of the Civil Rights Act of 1991. *See* Pub. L. 102-166, Title I, § 102, Nov. 21, 1991, 105 Stat. 1072. Among the changes wrought by the 1991 Act were the introduction of compensatory and punitive damages, limitations or caps on the amounts of those damages, the introduction of jury determination of those damages, and the concomitant division of responsibility between judge and jury. These changes all apply to the case at bar. *See* 42 U.S.C. § 1981a.[2]

Particularly applicable to the issue presented in this case is the cap that limits compensatory damages "*for future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . ." 42 U.S.C. § 1981a(b)(3) (emphasis added). The 1991 Act sets up a sliding scale of caps on compensatory damages and punitive damages. *See* 42 U.S.C. § 1981a(b)(3)(D). Under that section, large companies, such as DuPont, are subject to the maximum of $300,000 in compensatory damages and in punitive damages. Plaintiff had the option of a jury trial on compensatory and punitive damages, *see* 42 U.S.C. § 1981a(c), but chose a bench trial.

The 1991 Act also contains a very precise statement of exclusions from compensatory damages—"back pay, interest

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[2] In addition to the very structure of the 1991 Act, its legislative history indicates an intent of Congress to transform Title VII into a tort-like statute. P.L. 102-166, House Report No. 102-40 (II), p.104 (May 17, 1991) (dissenting views). This resemblance to a traditional tort action is now magnified from the time of the 1972 Act, although in one of the earliest appellate cases after that 1972 Act the Fourth Circuit noted that a prospective award in a Title VII case is analogous to that awarded in an ordinary tort case. *Patterson v. The American Tobacco Co.*, 535 F.2d 257, 269 n.10 (4th Cir.) *cert. denied sub nom. American Tobacco Co. v. Patterson*, 429 U.S. 920 (1976) (citing *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]." 42 U.S.C. § 1981a(b)(2). Excluded from the definition of compensatory damages, these remedies remain subject to the equitable powers of the district court. Section § 706(g) specifically sets forth the equitable remedies available to the district court: injunction, affirmative action (including reinstatement), back pay and other equitable relief. 42 U.S.C. § 2000e-5(g)(1).

The lone question presented, whether the statutory limits placed on compensatory damages by Congress nearly a decade ago includes front pay, is a very narrow one.

Front Pay

The term "front pay" is not found in the Act. This Court has not directly addressed the nature of front pay, much less its place, if any, in the current legislative scheme of remedies under the civil rights statutes. Only in passing has this Court mentioned its existence in lower court case law, as in a footnote in *Burke*, 504 U.S. at 239 n.9, where it was noted that some courts allowed wrongfully discharged Title VII plaintiffs, when reinstatement was not feasible, "to recover 'front pay' or future lost earnings." *Id.* at 239 n.9 (citation omitted).[3]

Lower courts have viewed front pay as a type of prospective relief, often in lieu of reinstatement. *See Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 556 n.9 (10th Cir.), *cert. denied sub nom. Ortho Biotech, Inc. v. Medlock*, 528 U.S. 813 (1999) (noting that front pay is sometimes granted absent

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[3] Earlier, this Court noted in passing in a footnote of the "possibility of an award of monetary damages (sometimes designated 'front pay',)" but suggested that it was an unresolved issue. *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 778 n.38 (1976). In any event, front pay has never been subject to the degree of analysis presented here.

a request for reinstatement).[4] This form of relief assumes plaintiff would have continued on in her position, absent an unlawful act by her employer. The lower courts have often awarded monetary damages under the name of "front pay" when reinstatement of the plaintiff was deemed inappropriate or impractical and an award of statutory back pay failed to make the plaintiff whole. *See e.g., Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir.), *cert. denied*, 510 U.S. 1164 (1994); *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1278-79 (10th Cir. 1988). It is an estimation of the monetary award equal to the gain plaintiff would have received if she had been reinstated. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998).

The lower courts have generally calculated front pay by discounting the present value of the difference between the earnings a claimant would have received in her old position and the earnings she can be expected to receive in her present and future employment. *McKnight v. General Motors Corp.*, 908 F.2d 104, 116 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991). ("*McKnight I*"). The lost earnings are those likely to occur between the date of judgment and the time when the claimant can assume a new position. *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977).

The claimant has a duty to find other employment and to keep it once it is located. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999). So, although necessarily speculative in nature, front pay is an award of limited duration. *Williams*, 137 F.3d at 954.

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[4] The lower courts have generally recognized reinstatement as the preferred remedy. *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1020 (9th Cir. 2000); *Gotthardt v. Nat'l. R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999).

STATEMENT OF THE CASE

This Title VII action, alleging sexual discrimination, was originally filed by Sharon B. Pollard ("Petitioner" or "Pollard") against E.I. du Pont de Nemours and Company ("Respondent" or "DuPont") in the United States District Court for the Western District of Tennessee in 1995. Pollard also alleged state law claims of intentional infliction of emotional distress, negligence, and loss of consortium.[5] After a trial to the court without jury, the district court awarded Petitioner $107,364 in back pay and accrued benefits, $300,000 in compensatory damages, the maximum permitted by the statutory cap contained in 29 U.S.C. § 1981a(b)(3), and attorney fees and costs on the discrimination claim. *Pollard v. E.I. du Pont de Nemours and Co.*, 16 F.Supp.2d 913, 924 (W.D.Tenn. 1998). [J.A. 77-78].

The district court noted that the $300,000 cap was insufficient to compensate Pollard for all future damages, including "psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement." [J.A. 77]. Nevertheless, the district court never made a finding that reinstatement was impractical nor the sum of front pay it would have awarded.

The only part of the district court's opinion relevant to the issue presented here is a short statement in a footnote that the court was bound by the Sixth Circuit's position that front pay is subject to the damage limitations contained in 28 U.S.C. § 1981a(b)(3). *Pollard*, 16 F.Supp. at 923 n.19. [J.A. 77].

A timely appeal was taken by DuPont to the United States Court of Appeals for the Sixth Circuit. Pollard filed a cross-appeal on the limitation of front pay damages and the summary judgment dismissing her state law claims. The

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[5] All of these were dismissed at summary judgment and are not at issue here.

Sixth Circuit reversed the district court's summary judgment in favor of DuPont on the state law claim of the intentional infliction of emotional distress and remanded this claim. In all other respects, the Sixth Circuit affirmed the judgment of the district court. The panel decided it was bound by prior circuit precedent concerning the cap on front pay. [J.A. 100-01].[6]

As to the question presented to this Court, the Sixth Circuit panel affirmed the district court's decision that front pay was an element of future pecuniary losses under 42 U.S.C. § 1981a, and thus was subject to that section's monetary cap of $300,000 on compensatory damages. Both the district court and the Sixth Circuit panel felt bound by an earlier panel decision, *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), *cert. denied*, 525 U.S. 822 (1998), that placed front pay under the statutory cap on damages. *Pollard v. E.I. du Pont de Nemours and Company*, 213 F.3d 933, 945 (6th Cir. 2000). [J.A. 100].

Hudson, the basis for the Sixth Circuit's decision in this case, was a Title VII sex discrimination action. While one of the principal issues there was whether the statutory cap on compensatory damages applied to the entire action or per claim, an issue not presented here, the court also decided that the cap on "future pecuniary losses" under 42 U.S.C. § 1981a included "front pay" awarded in lieu of reinstatement. The *Hudson* court concluded that front pay was a "future pecuniary loss" because it is a measure of damages the plaintiff would have received "but for the discrimination." *Hudson*, 130 F.3d at 1203.

The *Hudson* court noted that front pay is not an equitable remedy specifically authorized by § 706(g) of Title VII, the enforcement/remedial section of the Act. 42 U.S.C. § 2000e-

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[6] Pollard's petition for rehearing, having gained less than a majority of the entire court for such a hearing, was returned to the original panel, which denied the petitions. [J.A. 105].

5(g). The court also noted that in the history of the adjudication of the Act, front pay had "always been the heart of 'future pecuniary losses' in discrimination cases." Thus, the *Hudson* court concluded that front pay is a "future pecuniary loss," not otherwise authorized by § 706(g), and was subject to the statutory cap on damages.

Since the decision of the Sixth Circuit in this case, DuPont has satisfied the judgment in the federal claims, which would have included any claim for punitive damages. DuPont has granted Pollard an incapability pension. The district court has stayed adjudication of the state law claim pending decision of this Court.

The Petition for Writ of Certiorari was filed with this Court on November 13, 2000 and granted by this Court on January 8, 2001.

SUMMARY OF ARGUMENT

The remedial scheme of redress under Title VII, as it appears on the face of the United States Code since 1991, is clear and sensible. On the face of the Code, the respective roles of the judge and jury are clearly and quite conventionally defined. The jury is the primary fact finder, determining liability. It also determines compensatory damages, including damages for future pecuniary losses—a conventional form of legal damages. It also determines punitive damages.

The trial court is concerned, as before, with the availability of equitable relief. It determines whether reinstatement is warranted. In addition, the court determines whether an essentially restitutionary remedy, back pay, is due.

There is no overlap in the functions of the judge and jury. There is nothing particularly unusual about the remedial scheme.

Petitioner's argument for an interpretation contrary to this common-sense reading of the remedial scheme is based

essentially on the fact that before 1991 many lower courts had held that where reinstatement was not appropriate, it was within their equitable power to grant prospective monetary relief, front pay, in lieu of reinstatement. And indeed, a trial court faced with a statute limited to equitable relief and frustrated by one or both parties' inability to make reinstatement feasible, might reasonably conclude that it enjoyed sufficient equitable powers to grant to a plaintiff a form of substitutionary relief that would ordinarily be regarded as legal in character, front pay.

Where there is no jury available to award legal relief, it is perhaps understandable that an equity court, having determined liability, may also find it within its power to grant some monetary relief.

However, that rationale does not survive the 1991 amendments. Whatever necessity militated toward allowing a trial court to award certain forms of legal relief in the absence of a jury do not survive the remedial scheme that Congress created in 1991. Congress has made the jury the primary fact finder. And Congress has assigned to the jury the role of awarding compensatory damages, including damages for future pecuniary losses. It is one thing for a trial court in equity, finding the plaintiff without any alternative, to find within itself the power to award a form of relief needed to make the plaintiff whole. It is quite another thing for a trial court to aggrandize, under the heading of its equitable powers, the ability to award a remedy that is historically legal, and properly the subject of a jury determination, when there is a jury available to entertain the matter. Whatever power a court in equity may have had to award front pay before 1991 has been eliminated with the ready availability of a jury trial since 1991.

Moreover, in the alternative, it is doubtful that even before 1991, courts properly awarded front pay as an equitable remedy. At the time of the separation from England,

Chancery did not regularly grant monetary relief in lieu of specific performance or injunctions. Without broad Congressional grant of such authority, monetary relief in lieu of specific performance or injunction must be a legal damage. Here, future monetary relief, whether called front pay or future lost earnings or anything else, is a legal remedy. It may still be recovered, but only as legal damage, most likely as a future pecuniary loss, an element of compensatory damages.

ARGUMENT

I. FRONT PAY IS A COMPENSATORY DAMAGE UNDER TITLE VII

In 1991, Congress enacted a fundamental change to the remedial scheme under Title VII. Among other things, Congress created for the Title VII plaintiff a right to a jury trial and the right to have a jury award compensatory damages, including damages for future pecuniary losses. This creation of a right to a jury trial necessarily had a major impact on what had heretofore been the responsibilities of the trial court in a Title VII case. Whereas before the 1991 Act, the trial judge was the primary fact finder, after the 1991 enactment, the primary fact finder was now the jury. The historic fact finding power of the trial court in Title VII cases must give way to the primacy of the jury.

Not surprisingly, given the shift from judge to jury, the 1991 enactment, and particularly section 1981a, also had an effect on the trial court's remedial authority. Congress having expressly assigned to the jury the responsibility to award compensatory damages, including future pecuniary losses, a trial court can no longer claim that the power to award the classical form of future pecuniary damages known as front pay is within its "equitable power." In this area as well, the court's prior authority must give way in the face of the primacy of the jury under Congress' remedial scheme.

This Court has recognized that the 1991 Act wrought fundamental and dramatic changes in the process of remedies when it observed that the addition of jury trials and compensatory and punitive damages "signals a marked change in its [Congress'] conception of the injury redressable by Title VII." *Burke*, 504 U.S. at 241 n.12. Again, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court recognized that the 1991 Act "significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to back pay under prior law." *Landgraf*, 511 U.S. at 253-54. The Court went on to note that the 1991 changes really created "a new cause of action." *Id.* at 283. Indeed, it is correct to characterize the change wrought in the remedies provisions of the Act as "dramatic," as the Fifth Circuit did in the opinion affirmed by this Court in *Landgraf. Landgraf v. USI Film Products*, 968 F.2d 427, 433 (5th Cir. 1992).[7]

As noted above, even a cursory review of the 1991 Act and its predecessors reveals that changes to the statutory structure, especially as to remedies, were fundamental. Monetary damages were added to potential remedies. A jury was added to the adjudicatory process, to pass on the question of damages.

A. Front Pay Is Included In Damages For Future Pecuniary Losses Under Section 1981a(b)(3), And Is Not A Form Of Equitable Relief Under Section 706(g).

Both parties would agree that a plain meaning of section 1981a is largely dispositive of the question presented. [Pet. Br. 17]. However, Petitioner's analysis and conclusion are in

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[7] In a later case, the Fifth Circuit noted that the 1991 Act "made fundamental changes in both the procedures and remedies available to Title VII litigants." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

error, for they are far from the plain meaning of section 1981a.

A key to deciding this case and a notable addition to the remedies scheme of the 1991 Act is the term "future pecuniary losses" as an element of compensatory damages. 42 U.S.C. § 1981a(b)(3). On the face of that Congressional language, front pay or the remuneration for future lost earnings is clearly an element of "future pecuniary loss" and thus part of compensatory damages capped by the statute.

1. *The Plain Language of Future Pecuniary Loss Includes Sums for Future Earnings, Front Pay*

Rather than focusing on the plain language of section 1981a, Petitioner attempts to weave an intricate web of statutory definition, curiously attempting to define "compensatory damages" by its exceptions [Pet. Br. 17], by a set of presumptions [Pet. Br. 18], by snippets of legislative history [Pet. Br. 18-20], by sharp criticism of the *Hudson* case [Pet. Br. 22-25], and a few other disconnected arguments. Pollard is clearly wrong.

Petitioner largely ignores the plain meaning of one of the key terms of the new provision: "future pecuniary losses." It is that term which conveys the real change in the organization of damages under the new remedies regime of the 1991 Act.

It is a maxim of statutory construction that a legislative term, unless otherwise defined, will be interpreted as taking its ordinary, contemporary and common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). This ordinary or plain reading must govern, absent persuasive reasons to the contrary. *Burns v. ALCALA*, 420 U.S. 575, 580 (1975); *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 465 (1968). It must be clear that Congress intended a term to mean something quite different for the ordinary, plain meaning to be discarded. *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

Given its plain and ordinary meaning, "future pecuniary losses" must relate to monetary losses in the future. Even without resort to the dictionary, the meaning of these three words is clear on their face. Indeed, the *Hudson* court was correct when it noted that "future pecuniary losses" must mean, at the least, "money which will be lost at a later time." *Hudson*, 130 F.3d at 1203.

"Future pecuniary losses" is not otherwise defined in the Act; indeed, it is part of the definition of "compensatory damage" under 42 U.S.C. § 1981a(b)(3). There is nothing in the remedies provision or otherwise in the Act that would mitigate against adopting a common-sense, plain reading of the phrase to mean monetary or money losses in the future.

Recourse to the dictionary confirms the plain meaning: "pecuniary loss" means a loss of money or something of monetary value, *Black's Law Dictionary* 957 (7th Ed. 1999), or prospective advantages of a pecuniary nature. *Ballentine's Law Dictionary* 928 (3rd Ed. 1969).

There is also no well-established meaning for the term "future pecuniary losses" that would alter the plain meaning of future money losses. In fact, a search of the United States Code does not reveal *any* other use of the term.[8] Therefore, there are no real concerns that Congress borrowed terminology with accumulated "legal tradition and meaning of centuries of practice" that would form a basis for an exception to the plain meaning axiom. *Evans v. United States*, 504 U.S. 255, 259 (1992) (citing *Morissette v. United States*, 242 U.S. 246, 263 (1952)).

The legislative history of the 1991 Act is also silent as to any special meaning that Congress attached to "future

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[8] Although not used in any other provision of the Code, case law under the Jones Act, 46 U.S.C. Appx. § 688 and Death on the High Seas Act, 46 U.S.C. Appx. § 762, has used "future pecuniary losses" to describe recovery under those statutes. *See, e.g., Humble v. Mountain State Constr. Co.*, 441 F.2d 816, 820 (6th Cir. 1971).

pecuniary losses." Thus, it is beyond debate that "future pecuniary losses" refers to monetary damages to be awarded to a claimant for future losses.

The other critical term under scrutiny, "front pay," is not a statutory term, but is the type of monetary award that is part of the new future pecuniary losses rubric, and thus part of compensatory damages under the Act. Front pay is at least an element of the future monetary damages created and capped by Congress in 1991.

This facial and plain reading of the statute is essential in light of the fact that there is no meaningful and appropriate legislative history from which to glean the meaning of front pay under the new, reorganized remedies provision of the Act. Also, Petitioner's reliance on pre-1991 decisions of the courts of appeals [Pet. Br. 17] is of no avail to her in that those cases, of course, were not construing the new liability/remedy structure of the 1991 Act.[9] The cases since the 1991 Act have uniformly lacked any analysis of how the structure of the new provision changed the manner in which remedies were to be treated.

Even the legal lexicon supports the proposition that "front wages" are a form of prospective compensation. *Black's Law Dictionary* 1573 (7th Ed. 1999). In contrast, a "backpay award" is an entitlement to an employee "to accrued but uncollected wages or benefits." *Id.* at 133.

Recent attempts to counter the *Hudson* court's plain reading of the term future pecuniary losses to include front

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[9] Respondent does not contest that the lower courts have long considered front pay as a form of prospective relief. Most often used in relation to the lack of reinstatement, an award of front pay "is designed to monetize" the value of continuing in a former position. *Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991). Subject to mitigation by a plaintiff, front pay is the "salary that an employee would have received" had he or she not been improperly terminated. *Shore v. Federal Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994).

pay are flawed. For example, the Seventh Circuit recently attempted to reduce the significance of the *Hudson* court's analysis by stating that future pecuniary losses could include "future medical expenses." *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500 (7th Cir. 2000). However, even if "future medical expenses" are "future pecuniary losses," that does not eliminate front pay as another "future pecuniary loss."

This realignment of front pay as an element of future pecuniary losses is born out by the absence of "front pay" from any provision of the statute. Members of Congress, whether or not they were aware of the use of the concept of front pay after the passage of the 1972 Act and of lower court decisions utilizing monetary awards in lieu of reinstatement, deliberately altered the prior remedial landscape. The absence of "front pay" in the 1991 Act and the creation of a broader category of damages, future pecuniary losses, reinforces the need to consider front pay as part of the natural category of items included within future pecuniary losses.

Petitioner's analysis of the plain meaning [Pet. Br. 25] of the new measure of damages, "future pecuniary losses," is shallow and misconstrues the statutory definition of "compensatory damages." Contrary to Petitioner's assertions, "compensatory damages" is not defined solely by its exclusions, Section 1981(a)(b)(2), but also by sub-section (b)(3) that includes "future pecuniary losses." This new measure of damages includes moneys formerly awarded as "front pay."

2. *This Court Should Construe This Statute To Avoid Raising Serious Seventh Amendment Jury Trial Issues.*

Two additional changes in the Act brought about by the 1991 Act reinforce the conclusion that the new remedial scheme treats front pay as compensatory damages. One, the 1991 Act radically changes the remedial scheme by not only

creating the new categories of compensatory and punitive damages, but also sets up the new institutional process of divided adjudicatory responsibility of judge and jury. Two, the jury has been allotted the decision on legal damages, 42 U.S.C. § 1981a(c), while the judge retains the equity jurisdiction.

Prior to the changes of 1991, judges performed all adjudication since remedies were limited to equity. *Landgraf*, 511 U.S. at 252. Although federal district judges did award front pay on an apparent theory that courts could fashion monetary remedies when reinstatement was deemed inappropriate, the 1991 changes in the Act made front pay, which we have shown to be prospectively compensatory, subject to the jury under the rubric of compensatory damages.[10]

Courts sitting in equity without a jury under the statute as it existed prior to 1991 may have believed they had power to grant ancillary monetary relief when traditional equity power (reinstatement) had failed or been frustrated. But, it is quite a different thing to suggest, as Petitioner does throughout her brief, that an equity court can grant a legal remedy, monetary damages, where Congress has seen fit to place a jury in the process to decide such damages. Such a position would certainly implicate the Seventh Amendment. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990). Of course, this Court should "'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998) (citing *Tull*, 481 U.S. at 417 n.3 (quoting *Curtis*, 415 U.S. at 192 n.6)).

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[10] This assumes, arguendo, that district courts had appropriate equitable powers to grant such monetary relief when reinstatement failed. We will argue alternatively below [pp. 34-41] that they did not.

The sweeping changes of the 1991 Act to remedies clearly evidence, on their face, a design to collect all compensatory damage and to have them decided by a jury. The compensatory nature of front pay puts it squarely within the embrace of future pecuniary losses as an element of the new statutory structure of compensatory damage. 29 U.S.C. § 1981a(b). As an element of compensatory damages, front pay is now subject to the statutory cap on those compensatory damages.

This conclusion is quite consistent with the dual legislative purposes of Title VII: eradicating discrimination throughout the economy and making persons whole who had suffered on account of unlawful employment discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). The expanded remedial provisions both enlarge the potential penalties with both compensatory and punitive damages (in addition to equitable relief) and also expand the potential sources of remuneration to a plaintiff.

To all appearances, Congress has specifically assigned to the jury the general fact finding responsibility and the specific responsibility to determine compensatory damages, including future pecuniary damages. In light of the primacy of the jury, it would be wholely inappropriate for the district court to aggrandize for itself the responsibility for front pay, divesting the jury of its role as finding appropriate remedies within this newly restructured remedial system.

B. A Fair Construction Of The Statute Is That Front Pay Is A Legal Remedy.

The statutory definition of "compensatory damages" under Title VII specifically excludes, inter alia, "any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000-e-5(g)]."[11] Section 706(g), the

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[11] It is undisputed that all other statutory exclusions from "compensatory damages" do not apply in this case.

general equitable relief section of the Act, contains the statement that such relief includes "any other equitable relief as the court deems appropriate."

Thus, if front pay, in the context of this case, is a legal rather than an equitable remedy, front pay is not excluded from the definition of "compensatory damage." Indeed, a review of cases from this Court demonstrates that front pay, a monetary damage award, is a classic legal remedy under this Court's jurisprudence.

It is firmly established that compensatory and other monetary damages are considered legal remedies. *Terry*, 494 U.S. at 570; *Curtis v. Loether*, 415 U.S. at 196.[12] There is a presumption that monetary damages are legal remedies, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 476 (1962), or legal in nature. *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).[13] To this general rule, there are two primary exceptions, recognized by this Court; neither apply to this case.

1. *Front Pay is Not Restitutionary.*

This Court has noted that monetary damages may be restitutionary and equitable in nature. *Curtis*, 415 U.S. at 197 (noting that the payment of money as "back pay" may be considered restitutionary in some cases). Restitution is designed to prevent unjust enrichment by a defendant. Restatement of Restitution § 1 (1937). As such, the measure of damages looks to defendant's gain, not to plaintiff's loss. *Id.* at cmt. a.

Front pay is not a form of equitable restitution. It does not restore plaintiff to a status quo ante, a prominent goal of

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[12] *See also Felter*, 523 U.S. at 352; *Veazie v. Williams*, 49 U.S. 134, 160 (1850).

[13] To the same effect, see cases collected in *Granfinaciera, S.A. v. Norberg*, 492 U.S. 33, 47-48 (1989). Petitioner's construction of ADEA cases is unconvincing. [Pet. Br. 24 n.23].

restitution. *Tull v. United States*, 481 U.S. 412, 424 (1987).[14] Rather, front pay is an award of damages for continuing injury.

The denomination of "back pay" as a form of equitable relief does not demand a similar treatment of front pay. Back pay has the function of restoring money unlawfully withheld since employment termination. *Albemarle*, 422 U.S. at 419. It is highly calculable and otherwise fits the mold of restitution. In addition, it has been specifically named by Congress as an equitable remedy.[15]

On the contrary, front pay is a prospective remedy and is, by that nature, somewhat speculative. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992) (*McKnight II*). The speculative nature of the award and its prospective view of damages militate to cast front pay as a legal remedy rather than restitutionary.

2. *Front Pay Is Not Incidental To Reinstatement But is Rather a Legal Remedy Instead Of Or In Lieu of Reinstatement.*

This Court also has recognized that equity courts have awarded monetary damages that are "incident to or intertwined with injunctive relief." *Tull*, 481 U.S. at 424. However, front pay, in the context under review here, does not resemble the type of relief that forms the basis for this exception to the general rule that monetary damages are legal relief.

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[14] This Court came to the same conclusion in *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (finding restitution permissible under § 205(a) of the Emergency Price Control Act of 1942 to restore to status quo ante).

[15] *See Terry*, 494 U.S. at 572 (suggesting that congressional specification of a remedy as "equitable" is at least some evidence of its nature).

This "incidental and intertwining" exception to the general rule is bottomed on the historic proposition that courts of equity had discretion to decide incidental legal claims. However, to the extent this exception is grounded on the equitable clean-up doctrine, this Court long ago rejected its application to federal courts and also rejected any "incident to equity" theory when it affirmed the right to a jury trial where equity and legal issues are presented in a single case. *Dairy Queen*, 369 U.S. at 470, 473 (money demand with injunctive relief request is a legal claim triable by jury). *See also Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508-09 (1959).

Subsequent decisions of this Court do not demand a different conclusion. In *Tull*, this Court held, "A court in equity was empowered to provide monetary rewards that were incident to or intertwined with injunctive relief." *Tull*, 481 U.S. at 424. In that case, the United States had brought an action to collect civil penalties and for injunctive relief under the Clean Water Act, 33 U.S.C. § 1251 et seq. (1988 and Supp. 1990). In deciding whether civil penalties were legal or equitable relief, the Court dismissed the argument that somehow civil penalties were incidental to or intertwined with an injunction, noting that there was a great disparity between the two forms of relief and that they were independently authorized. *Id.* at 425.

Here, under Title VII, it is clear that the claims of reinstatement and front pay are quite separate claims, one being in lieu of or as an alternative to the other. Also, there is a great disparity in size and value between reinstatement and a claim for front pay in this case.[16]

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[16] Petitioner is incorrect to intimate that the amount of front pay is fully established on the record. [Pet. Br. 21]. There have been no findings in that regard or whether reinstatement would be appropriate.

3. *A Legal Remedy in Lieu of Reinstatement Has Not Been Recognized by This Court.*

A third and submittedly specious exception to the general rule that monetary damages are legal remedies has been developing in the lower courts. Many courts that have found front pay to be an equitable remedy have done so by finding that since front pay is granted in lieu of reinstatement, a clearly statutorily designed equitable remedy, that front pay also must be equitable. *Kramer v. Logan Co. Sch. Dist. No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998)[17]

This Court, as it has not recognized front pay as a substitute for reinstatement, never has recognized front pay as an equitable remedy because it is made "in lieu of reinstatement." This Court should not adopt that proposition here.

The front pay remedy, to the extent it is an award "in lieu of reinstatement," is, in reality, only another means of compensating plaintiff for some perceived prospective harm. Such a monetary compensation does not lose its status of a legal remedy because it is awarded *instead of* an equitable remedy which cannot be accomplished. To do so would stand equity on its head. The classic rendition of equity as being available where legal relief fails would be inverted.[18]

Whatever expansive expression of equitable powers the lower courts adopted under the law prior to 1991, it need not

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[17] *See also Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998); *Thome v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986).

[18] Parenthetically, although it is less than clear in the district court's conclusions of law in the instant case, it appears that the court included front pay as an element of compensatory damages. *Pollard*, 16 F.Supp. at 923 n.19. [J.A. 77-78]. In fact, the elements of damages noted by the court, *Id.*, are well within the embrace of compensatory damages. Of course, the district court never made a finding that reinstatement was inappropriate. *Pollard*, 16 F.Supp. at 920-21 [J.A. 69].

be perpetuated. The statute as it stands today allows full recompense for past and future injury to a Title VII plaintiff. Back pay is secure under the specific grant of equitable authority under § 706(g). Any monetary damage extending beyond the date of judgment can be recovered as a compensatory damage. Front pay, rightly seen as another legal remedy, is recoverable as a future pecuniary loss.

4. *Lost Future Earnings are Compensatory Damages.*

An equally faulty analysis and confusion of theories of relief in the examination of "lost future earnings" also has beclouded the evaluation of front pay as damages. Understood correctly, front pay represents the pay a plaintiff would have earned after judgment but for a finding that reinstatement is impossible or inappropriate.[19] The Seventh Circuit, however, seriously misconstrued this concept when it held that loss of future earnings was a compensatory damage but that front pay was not. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952-53 (7th Cir. 1998). While the court correctly found that "lost future earnings" are compensatory damages, the court failed to find front pay is exactly that, a future earning.

The error of the decision lies in a confusion of lost future earning and lost earning capacity. The Seventh Circuit incorrectly used the terms interchangeably. *Id.* In reality the concepts are quite separate, as the Arizona Supreme Court has noted in criticizing the *Williams* decision. *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 798 (Ariz. 1998).[20]

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[19] See discussion of front pay at pp. 3-4 ante.

[20] The Seventh Circuit compounded the error by later finding that front pay is not capped, citing *Williams* as authority for the proposition that front pay is an equitable remedy. *Pals*, 220 F.3d at 499.

Significantly, in an earlier examination of front pay the Seventh Circuit, Judge Posner questioned the propriety of awarding a monetary award where the statute (pre-1991 Act) was confined to equitable relief. *McKnight I*, 908 F.2d at 117. The opinion also notes, correctly, that front pay "is realistically damages for lost future earnings—a legal rather than an equitable remedy. *Id.*[21]

In reality, both lost future earnings and lost earning capacity are recoverable as compensatory damages under the tort-like remedies of the 1991 Act. However, the former is clearly the same as front pay, recoverable now as a compensatory damage.[22]

5. *Loss of Future Earnings: a Measure of Legal Damages at Common Law.*

A better analysis model has always been to examine the historical context of how courts at common law have dealt with similar problems. Historically, in breach of employment contracts, plaintiffs could recover actual damages from time of breach to judgment, as well as prospective damages. Where there has been a wrongful termination of employment the measure of damages covers both lost earnings before and after judgment. A. Corbin, *Corbin on Contracts*, § 1095 (1964).[23] At common law future wages is the measure of damages for failure to pay wages "that would have been

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[21] *See also Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990) (equating front pay with "future lost earnings"); *Haskins v. City of Boaz*, 822 F.2d 1014, 1015 (11th Cir. 1987) (front pay is "prospective lost earnings").

[22] State courts seem easily to conceptually equate lost future earnings with front pay. *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1333 (Mass. 1997); *Martini v. The Boeing Co.*, 971 P.2d 45, 49 (Wash. 1999).

[23] *See also* S. Williston, *Law of Contracts*, § 1358 (3d Ed. 1968), and cases cited therein.

payable for services that would have been rendered under the contract." *Battaglia v. Clinical Perfusionists, Inc.*, 658 A.2d 680, 685 (Md. 1995). "On the other hand, past wages, in full, measure damages for failure to pay wages for services rendered prior to termination." *Id.* (Footnote omitted).[24]

Thus, at common law a breach of employment contract contains a measure of damages covering both past and prospective damages. *Pierce v. Tennessee Coal, Iron & R.R. Co.*, 173 U.S. 1, 16 (1899). As such, the prospective damages in the present case should be treated in the same manner, as normal legal remedies.

II. LEGISLATIVE HISTORY DOES NOT SUPPORT PETITIONER'S THESIS THAT FRONT PAY IS NOT SUBJECT TO STATUTORY CAPS.

Petitioner, and the Government, rely heavily on the legislative history of section 1981a to support their argument that front pay is excluded from the operation of the statutory damage caps of section 1981a(b)(3). However, if the Court resorts to the legislative history at all, it should conclude that this history fails to support Petitioner's argument. Indeed, a thorough review of the entire legislative history results in the conclusion that Congress never intended to create front pay as a remedy. Thus, if Petitioner can recover anything for front pay or future lost earnings, that sum, at most, would be an element of future pecuniary loss within the definition of compensatory damages under section 1981a, and thus be capped under that statute's formula.

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[24] To the same effect: *Stoffel v. Metcalfe Constr. Co*, 17 N.W.2d 3 (Nebr. 1945); *Mason Co. Bd. of Ed. v. State Superint. of Schools*, 295 S.E.2d 719, 724 (W.Va. 1982).

A. Congress Did Not Exclude Front Pay From Statutory Caps Of The 1991 Act.

1. *Committee reports, where they exist, are devoid of reference to front pay.*

Despite its long and complicated path to becoming law, the Civil Rights Act of 1991 comes with little traditional legislative history. There were *no* committee hearings or reports on the final version of the Act.[25] There are, however, several House and Senate Committee Reports relating to earlier, but somewhat similar, versions.

One such version, S. 2104, was passed by both the House and the Senate but then vetoed by the President. *See* S. Rep. No. 315, 101st Cong., 2d Sess 1990, 1990 WL 259315 (Leg. Hist.) (June 8, 1990). S. 2104 provided that the compensatory damages that would have been made possible by the new law excluded only backpay and interest on backpay, *see Id.*, not the enacted version's "backpay, interest on backpay, [and] any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964," *see* Pub. L. 102-166 § 102(b)(2) (1991), 105 Stat. 1071, *1073 (1991); *see also* 42 U.S.C. § 1981a(3)(b)(2) (2000) (citing 42 U.S.C. § 2000e-5(g)). The Senate Report on S. 2104 reiterated that "the bill makes clear that a court may not award as compensatory damages backpay or any interest thereon, thus avoiding the possibility of duplicative recoveries." S. Rep. No. 315, 101st Cong., 2d Sess. 1990, 1990 WL 259315 (Leg. Hist.) (June 8, 1990) (citations omitted). Front pay is conspicuously absent from this exclusion and from the S.2104 Senate Report.

When President Bush vetoed S. 2104, he did so primarily on the ground that "the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas

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[25] Petitioner does not note this fact, but rather is content largely to focus on highly suspect hearing testimony [Pet. Br. 18-19] rather than conclusions drawn in the collegial manner of committee reports.

into our Nation's employment system." Veto Message on S. 2104—Message from the President—PM 152, 136 Cong. Rec. S16457-02, 1990 WL 161663 (Cong. Rec.) (Oct. 22, 1990). President Bush feared that the new law would lead to unwarranted litigation, and he found it "neither fair nor sensible to give the employers of our country a difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation." *Id.* at *S16458. He strongly urged consideration of an alternative bill, H.R. 1375. *Id.*[26]

H.R. 1, yet another rejected version of the Civil *Rights Act, set forth the same exclusions from compensatory* damages as the earlier versions, namely backpay and interest thereon. *See* H. Rep. No. 102-40(I) (Apr. 24, 1991), at 112; 2 U.S.C.C.A.N. 650, 102d Cong., 1st Sess. 1991. The committee reports relating to H.R. 1 explained that "[c]ompensatory damages include, *but are not limited to*, monetary relief for humiliation, pain and suffering, other psychological and physical harm, and loss of civil rights; medical expenses incurred as a result of psychological or physical harm; and *other economic losses* and out-of-pocket costs." H. Rep. No. 102-40(I) at 74 (emphasis added). This language is certainly broad enough to include front pay.[27]

In view of Petitioner's emphasis on legislative history, it is important to note that the Committee Reports on these earlier

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[26] Another bill introduced the same day as S. 2104, H.R. 4000, contained identical language for the present purposes. *See* H.R. Rep. No. 656, 101st Cong., 2d Sess. 1990, 1990 WL 188821 (Leg. Hist.); H.R. Rep. No. 644(I), 101st Cong., 2d Sess. 1990, 1990 WL 259280 (Leg. Hist.) The House Report on that bill, too, reiterated that "a court may not award as compensatory damages backpay or any interest thereon, thus avoiding the possibility of duplicative recoveries." H.R. Rep. No. 644(I), 101st Cong., 2d Sess. 1990, 1990 WL 259280 (Leg. Hist.), at n.80. Again, there was no mention or exclusion of front pay.

[27] This is the same committee report noted by the Government. [Gov't. Br. 21].

bills—the only Committee Reports available—did not make reference to front pay or its exclusion from compensatory damages. Rather, front pay is conspicuously absent from all of these reports.[28]

2. *Isolated references made by legislators and advocates are not authoritative.*

Petitioner urges the Court to interpret § 1981a based on three isolated references in floor debates over the proposed legislation and comments made in committee hearings on earlier, never-enacted bills. [Pet. Br. 34, 36, 37]. This Court has, however, often expressed its concerns about reliance on interpretive memoranda and floor statements when construing a statute. Certainly statements made by individuals testifying before subcommittees of an earlier Congress, espousing their personal agenda and regurgitating what courts had been doing, have even less value in terms of construing or applying § 1981a. Such caution is especially warranted in interpreting section 1981a.

When the language of the statute is clear, resort to legislative history is patently unnecessary. Here, the relevant statute provides that "future pecuniary losses" are subject to the damage caps. Front pay is clearly such a future pecuniary loss. If, as Petitioner here argues, "that is not what Congress meant, then Congress has made a mistake and Congress will have to correct it. We should not pretend to care about legislative intent (as opposed to the meaning of the law), lest we impose upon the practicing bar and their clients obligations that we do not ourselves take seriously." *Conroy v. Aniskoff*, 507 U.S. 511, 527-28(1993) (Scalia, J., concurring).[29]

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[28] Petitioner relies only on partisan testimony to attempt to establish the contrary. [Pet. Br. 18-20 and n.14 and 15].

[29] *See also Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, 506 U.S. 153, 166 (1993) ("when carefully

Representative Edwards and Senator Danforth introduced interpretive memoranda providing that compensatory damages "cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII." 137 Cong. Rec. H9527 (Nov. 7, 1991) (Rep. Edwards); 137 Cong. Rec. S15483, S15484 (Oct. 25, 1991) (Senator Danforth).

Neither of these advocate's statements is authoritative. In his Statement on Signing S. 1745, President Bush referred to Senator Dole's interpretive memoranda as authoritative 1991 U.S.C.C.A.N. 768, 27 Weekly Comp. Pres. Docs. 1701, 1702 (Nov. 25, 1991), not the memoranda introduced by Edwards or Danforth.[30] Senator Dole's interpretation of the Act did not explicitly exclude front pay from compensatory damages and thus from the damage caps. In fact, the section-by-section analysis incorporated into Dole's memorandum states simply that the Act "makes available compensatory and punitive damages . . . It sets an important precedent in tort reform by setting caps on those damages, including pecuniary losses that have not yet occurred as of the time the charge is filed, as well as all . . . nonpecuniary losses, whenever they occur." 137 Cong. Rec. S15473 (Oct. 30, 1991).

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read, we find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single reference by a single Senator during floor debate in the Senate"); *West Side Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 242-43 (1990) ("[T]he dissent's reliance on the legislative history to support its interpretation of the Act shows just how treacherous that task can be. The dissent appears to agree with our view that the legislative history of the Act, even if relevant, is highly unreliable, yet the interpretation it suggests rests solely on a few passing, general references by legislators . . . . We think that reliance on legislative history is hazardous at best, but where 'not even the sponsors of the bill knew what it meant,' such reliance cannot form a basis on which to interpret the statute.") (citations omitted).

[30] This Court has often viewed Presidential statements accompanying legislation as informative and helpful in construing an act. *See, e.g., Landgraf*, 511 U.S. at 255, 256 n.9.

Although the authority of statements made in floor debates is always suspect, the legislative debates on the Civil Rights Act of 1991 are even more so because the final version of the Act was referred to the House and Senate for negotiations without ever being referred to committee. As a result, there are no agreed-upon committee reports to guide the courts or construe statements made on the floor. Absent such constraints, the legislators attempt to engage in partisan lawmaking by making self-serving statements that they know will be entered in the Congressional Record. Such statements may or may not reflect the actual goals of the legislation. As Senator Danforth warned when considering the very legislation at issue in this case:

> It is very common for Members of the Senate to try to affect the way in which a court will interpret a statute by putting things into the Congressional Record . . . . That is one method of trying to doctor the legislative history and influence the future course of litigation . . . . Whatever is said on the floor of the Senate about a bill is the view of a Senator who is saying it. And if it is not written into the legislative language, it does not necessarily bind and probably does not bind anyone else . . . . [A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.

137 Cong. Rec. S15325 (Oct. 29, 1991). Senator Danforth concluded, "any judge who tries to make legislative history out of the free-for-all that takes place on the floor of the senate is on very dangerous grounds." *Id.* at S15346.

Usually partisan floor statements "cannot plausibly be read as reflecting any general agreements." *Landgraf*, 511 U.S. at 262. This Court has been careful to limit the value of such "floor debates." "[I]solated sentences clipped from floor debates and legislative reports" are of very limited value.

Kimel v. Florida Board of Regents, 528 U.S. 62, 89 (2000).[31] Thus, no weight should be given to Senator Kennedy's statement. Senator Kennedy commented during the debates on S. 1745 that "[c]ompensatory damages do not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964, including front pay." 137 Cong. Rec. S15234 (Oct. 25, 1991).

Petitioner's references to Congressional hearings [Pet. Br. 18-20] are also to no avail. This Court has always been "wary" of such hearing testimony, especially from non-legislators, which are obviously prone to represent partisan or individual views and interests. *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972). Of all of the possible legislative record, this category is the least likely to evidence a general view of the legislative body.

Accordingly, to paraphrase Senator Danforth, one of this legislation's cosponsors, any statements made in testimony or on the floor of the House or Senate or in interpretive memoranda discussed above that exclude front pay from compensatory damages and the damage caps should be taken with a large grain of salt. *See* 137 Cong. Rec. S15325 (Oct. 29, 1991). The remarks are also at odds "with the current of the broader statutory history of the [relevant] provisions." *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 220 (1998).

Likewise, the meager reliance by Petitioner [Pet. Br. 18, 26] and the Government [Gov't. Br. 23] on the EEOC Guidelines is appropriate. In fact, this Court has consistently found that mere agency interpretation of federal law, such as those in policy statements, agency manuals, and enforcement guidelines, all lack the force of law and are not entitled to much deference. *Christensen v. Harris County*, 529 U.S.

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[31] *See also, Crosby v. Nat'l. Foreign Trade Council*, 120 S.Ct. 2288, 2303-04 (2000) (Scalia, J. concurring).

576, 587 (2000).[32] These guidelines are entitled only to the respect they can garner through their "power to persuade." *Id.*, (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Since the subject guideline claims to draw authority from the legislative history, as the Government acknowledges [Gov't. Br. 23], they are due no weight where this Court can examine the legislative history for itself.

B. The Legislative History of § 706(g) (42 U.S.C. § 2000e-5(g)) Does Not Support Front Pay.

A broader statutory history of § 1981a necessitates reviewing the history of earlier versions of the Civil Rights Act to which it refers. If legislative history is relevant here at all, this earlier history is relevant to the present matter because the damage caps of 42 U.S.C. § 1981a limit only *compensatory* and punitive damages, and the statute provides that "[c]ompensatory damages awarded under this section shall not include backpay, interest on backpay, *or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g).*" 42 U.S.C. § 1981a(b)(2) (1999) (emphasis added). Front pay is not specifically enumerated as an exclusion from the compensatory damages that are subject to the caps. Therefore, if, as Petitioner argues, front pay is not limited by the damage caps, it must fall under the rubric of "any other type of relief authorized under section 706(g)."

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[32] *See also Reno v. Koray*, 515 U.S. 50, 61 (1995) (internal agency guidelines that is not subject to the rigors of the Administrative Procedure Act is entitled only to "some deference"); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 156-58 (1991) (interpretive guidelines do not receive Chevron-type deference); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"); *see generally 1 K. Davis & R. Pierce, Administrative Law Treatise* § 3.5 (3d ed. 1994).

The 1964 Act did not include the language, "or any other equitable relief as the court deems appropriate," so its legislative history does not speak to the scope of such relief. Front pay obviously was not within the contemplation of the drafters of the Civil Rights Act of 1964.[33]

The language that empowers a court to order "any other equitable relief as the court deems appropriate" was not added until the 1972 Act. The 1972 Act grew primarily out of two separate bills, one introduced in the Senate and one in the House of Representatives. Neither the Senate version nor the House version originally included the "any other equitable relief" language, but rather left the remedies section of the 1964 Act intact.[34] The House bill ultimately passed, but with amendments introduced by the Senate.

Perhaps the most dispositive explanation of the Senate's amendment, and thus the enacted version of this section,

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[33] The bulk of the legislative history of the 1964 Act revolves around the general need for civil rights anti-discrimination legislation. With respect to the specific provision allowing a civil suit to redress discriminatory action by an employer, the interpretive memorandum on H.R. 7152, introduced by Senators Clark and Case, the floor managers of the Senate, provides that "the relief sought would be an injunction against future acts or practices, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees or the payment of back pay. This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices . . . ." Interp. Mem. on H.R. 7152 (Apr. 8, 1964). "Section 10 (c) of the NLRA authorizes 'such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." *See Albemarle Paper Co.*, 422 U.S. at 419; *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). Again, front pay was not mentioned and apparently not contemplated.

[34] *See* Report of Senate Committee on Labor & Public Welfare, Proposed Equal Employment Opportunities Enforcement Act of 1971, S. 2515, S. 2617, and H.R. 1746, Bill Texts, Section-by-Section Analyses, Changes in Existing Law, Comparison of Bills Introduced, 92d Cong., 1st Sess. (Committee Print 1971).

comes from the section-by-section analysis of S. 2515 of the 1972 Act, introduced into the Congressional Record by Senator Williams. *See* 118 Cong. Rec. 4940 (Feb. 22, 1972). The Memorandum explains that § 706(g)(2) . . .

> is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice[,] to enjoin the respondent from such unlawful conduct and order such affirmative relief including, but not limited to, reinstatement or hiring of employees, with or without back pay[,] as will effectuate the policies of the Act. . . .
>
> *The provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of but also requires that the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. This broad reading of the need for effective remedies under this subsection is intended to be preserved in this bill in order to effectively combat the presence of employment discrimination.*

Id. at 4942 (emphasis added).[35]

Thus, this section, including the new language, was not intended to expand the relief available to victims of discrimination, but rather to preserve the available remedies,

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[35] A nearly identical explanation was adopted in the Section-by-Section Analysis of H.R. 1746, as enacted, although that analysis did not include the last quoted sentence. See 118 Cong. Rec. 7168 (Mar. 6, 1972).

and to ensure the *continued* broad exercise of discretion by courts.

After enactment of this amendment, however, courts began awarding front pay as an element of damages under § 706(g), interpreting the "any other equitable relief" language to afford them broader discretion in fashioning additional relief than they enjoyed under the 1964 Act. As the 1972 legislative history shows, however, that was *not* the intent of Congress. Furthermore, the courts erroneously categorized front pay as equitable relief.

Petitioner argues that treating front pay as compensatory damages would thwart the Congressional intent of augmenting the relief available to victims of discrimination, since applying the damage caps to front pay awards could actually result in lower damages than courts would have awarded under earlier law. [Pet. Br. at 20-21]. In reality, however, courts' awards of front pay under earlier law actually thwarted the Congressional intent of preserving rather than expanding the relief earlier available. Before 1991, courts were limited to ordering injunctive relief, reinstatement, backpay, and equitable relief. Front pay, as a legal remedy, was not available until the 1991 Act added the availability of compensatory damages. Accordingly, front pay *does* expand the relief available, even when the caps are applied.[36]

Accordingly, awards of front pay under section 706(g) were, prior to 1991, contrary to legislative intent, and contrary to established principles of equity. Such awards actually are properly characterized as compensatory damages,

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[36] It matters not that other courts have given a different interpretation of § 1981a. As explained in *Evans v. United States*, 504 U.S. 255 (1992): Error is not cured by repetition, and we do not discharge our duty simply by counting up the circuits on either side of the split. *Id.* at 294 n.7 (Thomas, J., dissenting)

which did not become available until the enactment of the Civil Rights Act of 1991.[37]

In summary, there is nothing authoritative in the legislative history of any of the relevant laws to support Petitioner's argument for excluding front pay from § 1981a's damage caps. To the contrary, a thoughtful and thorough analysis of the 1964 and 1972 legislative histories reveals that Congress did not contemplate awards of front pay under § 706(g). The lower courts somehow misjudged this Congressional intent, however, as well as the meaning of equitable relief, and apparently misread the new language as an expansion, rather than preservation, of their powers of discretion.

Accordingly, because front pay is not "authorized" under section 706(g), it is not excluded from compensatory damages. According to its clear, common and ordinary meaning, front pay is a "future pecuniary loss" subject to statutory damage limitations in § 1982(b)(3).

III. ALTHOUGH COURTS HAD HELD BEFORE 1991 THAT THEY COULD GRANT FRONT PAY AS EQUITABLE RELIEF, THEY WERE NOT CORRECT IN DOING SO.

Although we maintained above that perceived necessity may have persuaded district courts that they had authority to award front pay before 1991—and that such a rule may have had some basis, in a rather vague sense, with equity principles[38]—it was inappropriate for federal courts,

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[37] Any isolated comments by a few members of Congress have little relevance with regard to what was intended by the drafters of the 1972 Act. This Court has pointed out on previous occasions that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Waterman Steamship Corp. v. United States*, 381 U.S. 252, 269 (1965).

[38] Unfortunately, the early cases from the courts of appeals after the 1972 Act are singularly deficient in analysis of their equity powers and

purporting to exercise equity powers, to claim the right to award front pay. This Court has never approved this practice and ought not approve it in this case.

We have argued above that front pay is a legal remedy as a compensatory damage under the rubric of "future pecuniary loss." In the alternative, it is submitted that, if not a legal remedy, front pay is not a type of equitable relief that federal courts have the power to grant.

It is submitted that prospective monetary relief, front pay, especially "in lieu of reinstatement," is beyond the equitable powers of the federal courts. While federal courts have some inherent powers necessary to implement statutory remedies created by Congress, they do not have any inherent power to create entirely new equitable remedies of their own. The courts' inherent equitable powers are "confined within the broad boundaries of traditional equitable relief," *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

The inherent powers of the federal courts are limited to taking steps necessary "to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 517 U.S. 820, 823 (1996).[39] These inherent powers may, in appropriate situations, include the power to grant injunctive and other equitable relief where necessary to protect the courts'

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the effect of such limitation on the courts' ability to fashion front pay as a new remedy. *See, e.g., Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980); *E.E.O.C. v. Safeway Stores, Inc.*, 634 F.2d 1273 (10th Cir. 1980); *United States Fidelity & Guaranty Co. v. Lord*, 585 F.2d 860 (8th Cir. 1978); *White v. Carolina Paperboard Co.*, 564 F.2d 1073 (4th Cir. 1977).

[39] *See also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'") (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

integrity or ability to perform their adjudicatory functions. *See e.g. Hadix v. Johnson*, 144 F.3d 925, 937 (6th Cir. 1998). But "[a] court's inherent power is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829. Courts may not augment a substantive remedial scheme crafted by Congress. *See, e.g., Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1497-98 (10th Cir. 1990), *cert. denied*, 499 U.S. 960 (1991). This principle of deference counsels restraint is resorting to inherent power in the face of Congressional enactments. *Degan*, 517 U.S. at 523.

This Court recently underscored the narrowness of the federal courts' inherent equitable powers in *Grupo Mexicano*. The question there was whether the courts had the inherent power to enjoin a defendant from transferring assets in which no lien or equitable interest was claimed, even if such a transfer might compromise the plaintiff's eventual ability to collect a judgment. The Court answered that question in the negative, emphasizing that the federal courts have never had any such power. *Grupo*, 527 U.S. at 329. The Court specifically reaffirmed its "traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Id. Grupo Mexicano* squarely refutes any assertion that federal courts have free-floating inherent equitable power to grant injunctive-type relief except insofar as they have been specifically authorized by Congress. The assertedly equitable prospective monetary relief in this case should meet with a similar fate. Significantly, while *Grupo* dealt only with interim relief, the relief sought here is plenary and of potential great effect on the parties. Both substantive remedies were judicially constructed without Congressional approval.

Using the same analytical matrix as used in *Grupo*, 527 U.S. at 318, this Court should look to the acquisition of equity jurisprudence from England through Section 11 of the Judiciary Act of 1789 conferring on federal courts jurisdiction over all suits in equity. 1 Stat. 78. The equity jurisdiction

adopted at the founding of the Republic was to administer equity under the principles which "had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo*, 527 U.S. at 318 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).[40] Front pay as an equitable remedy is not bottomed on this historical basis. At the founding of the Republic, equity did not know the prospective money relief, now called front pay.

Justice Joseph Story, the maven of American equity jurisprudence, was emphatic that the concept of American and English equity was rather narrow: "[I]t would be a great mistake to suppose, that equity, as administered in England or America, embrace a jurisdiction so wide and extensive, as that which arises from the principles of natural justice above stated." J. Story, Commentaries *on Equity Jurisprudence*, Vol. I, sec. 2, p.2. (11th Ed. 1873). Story is very clear that there was a great divide between remedies at equity and common law; common law courts addressed damages, and equity courts were primarily involved with injunctive relief. *Id.*, Vol. I, sec. 30, p. 21.[41]

Specifically as to monetary damages, Story is quite definite that an equity court's potential remedies do not include an amount of damages, except in very narrow, limited circumstances, not presented in the instant case.[42] *Id.*, Vol. II, sec. 794, pp. 1-2 is quite clear as to this general principle:

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[40] *See also Payne v. Hook*, 74 U.S. (Wall.) 425, 430 (1868).

[41] A biographer of Justice Story has noted that Story came to these and similar conclusions well in advance of the construction of his *Commentaries* and quite close to the Judiciary Act of 1789. Gerald T. Dunne, *Justice Joseph Story* (Simon & Schuster 1970), p. 416.

[42] This is consistent with an early opinion of this Court that where an equitable claim fails, a remaining legal claim is not properly in an equity court. *Russell v. Clark's Executor*, 11 U.S. (7 Cranch) 69, 91 (1812).

> It may be stated, as a general proposition, that, for breaches of contract, and other wrongs and injuries, cognizable at law, Courts of Equity do not entertain jurisdiction to give redress by way of compensation of damages, where these constitute the sole object of the bill. For, wherever the matter of the bill is merely for damages, and there is a perfect remedy at law, it is far better, that they should be ascertained by a jury, than by the conscience of an equity judge. And, indeed, the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete, and adequate remedy at law. (Footnotes omitted).

Story does acknowledge three possible circumstances where monetary awards might be granted in equity. Compensation should be issued by an equity court only as incident to other relief, where there is no adequate remedy at law, or where some "peculiar equity intervenes." *Id.*, Vol. II, sec. 794, p. 2.

As to any incidental jurisdiction in equity to provide for pecuniary relief, Story is quite clear that the monetary sums must be truly "incidental" and "inseparable" to the primary equitable relief. *Id*, Vol. II, sec. 796, pp. 4-5. His example of such an incidental monetary relief is succinct:

> "So where a bill is brought by the vendor against the vendee for the specific performance of a contract of sale, and for a payment of the purchase-money, if the decree is for a specific performance, equity will decree the payment of the purchase-money also, as incidental to the general relief, and to prevent a multiplicity of suits . . . ." *Id.*

Front pay is in no way incidental to reinstatement or injunctive relief. It is, by ready admission of most lower courts, issued instead of or in lieu of reinstatement, which

arguably passes for a form of injunctive or specific performance relief.[43]

Story's other two exceptions have the same lack of effect on front pay. The "no adequate remedy at law" is totally inapplicable. In fact, in this case the application of this test would set the maxim of "no adequate remedy at law" on its head because front pay, a *monetary* award, is applied when an *equitable* remedy is unavailable. *See Id.*, Vol. II, sec. 798, p. 7.

The final exception, "where some peculiar equity intervenes," also does not apply here. Story limited it to "very special circumstances," such as fraud and special problems in specific performance. *Id.* at Vol. II, sec. 799, p. 8.[44]

Story's conclusions are confirmed by William Blackstone in his *Commentaries*, published in 1765, well before the separation of the colonies from England. Blackstone concluded that equity "mode of relief" focused on specific remedies that were modeled on method of compulsion "instead of giving damages." Blackstone, *Commentaries*, Bk. III, ch. 27, p. 438. Blackstone's discussion of jurisdiction "peculiar to the chancery" reveals nothing that would grant monetary rewards. *Id.*, at 426-28.

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[43] A strong argument has been made that reinstatement itself might not survive an historical analysis. M.S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. Ill. L. Rev. 1 (1988). However, for purposes of this argument, we will assume its viability as an injunctive-type relief, especially since Congress chose to retain it specifically in the 1991 Act. *See Terry*, 494 U.S. at 572 (noting that Congress's specification of a remedy as "equitable" is evidence of its character).

[44] Story recounts that even when monetary relief was granted in equity it was done so "either by reference to a master or by directing the issue, *Quantum Damnificatus*, which was tried by a jury. *Commentaries*, Vol. II, sec. 795, p. 4.

In addition, perhaps some of the best evidence that English law did not permit money damages from Chancery is that it took an act of Parliament in 1858 to give Chancery the power to grant compensation in conjunction with applications for specific performance and injunctive relief. Chancery Amendment Act 1858 (U.K.), 21 & 22 Vict., c27, s.3 (also called the Lord Cairns' Act). This was the first time English Chancery was given the power to award a form of damages in addition to or in substitution for specific performance or by injunctive relief. J. A. Jolowicz, *Damages in* Equity—A *Study of Lord Cairns' Act*, Cambridge L.J. 224, 231 (1975).

This historic development in equity jurisprudence was recounted as recently as last year in the House of Lords in *Attorney General v. Blake and Jonathan Cape Ltd.*, 4 All E.R. 385 (2000). Lord Nicholls in the lead judgment reviewed at some length the change in equity brought about by Lord Cairns' Act. "Section 2 empowered the Court of Chancery, at its discretion, in all cases where it had jurisdiction to entertain an application for an injunction or specific performance, to award damages in addition to or in substitution for an injunction or specific performance." *Id.* at 393.[46]

Congress has never expanded the rule of equity and the power of the federal courts to generally grant damages in lieu of equitable-type relief, as Parliament has done in England. The "body of doctrine which is to guide" the federal courts in this area is still that in existence at the time of the Judiciary

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[45] *See also* J. Freiheit, *The Breakdown of Hierarchy: Damages of Law Versus Damages in Equity*, 27 Man. L.J. 185, 186 (2000) (discussing Lord Cairns' Act and the development of Canadian Law).

[46] The Supreme Court of Canada also confirmed this change in equity in its recent opinion in *Cadbury Schweps Inc. v. FBI Foods Ltd.*, 1 S.C.R. 142 (1999). "The passage of Lord Cairns' Act in 1858 conferred on the Courts of Equity a jurisdiction to award damages in addition to or in lieu of an injunction or other specific equitable relief." *Id.* at 177.

Act of 1789, 1 Stat. 78. *Atlas Life Ins. Co.*, 306 U.S. at 568; *Gordon v. Washington*, 295 U.S. 30, 36 (1935).

Unlike in England and Canada, the jurisprudence of the federal courts in this country will not support "secondary or alternative relief of a legal nature" where a primary claim for equitable relief fails. *Alger v. Anderson* (C.C.) 92 F. 696, 710 (M.D. Tenn. 1899). Where equity fails or is frustrated, a legal claim instead of or in lieu of the failed equitable claim is not a matter of equity. *Id.* at 710, 712, 713.

These learned commentaries, and the studied case law they represent, are the wellheads of the jurisprudential tradition of this country, at least as to the nature of the reception of equity by the courts of this new country. They do not advocate flexibility in expanding the scope of the equitable powers that can be exercised by the district court. Rather, these early cases and commentaries suggest flexibility and adaptability concerning a pliant and ductile application of existing equitable powers to novel factual situations.

Here, Petitioner wrongly seeks to have this Court extend historic equitable powers to granting prospective monetary relief that is not incidental to other more traditional equitable relief. Front pay is clearly beyond the reach of traditional relief of a chancellor and thus is beyond the powers of the district court to grant.

We do hasten to add, however, that recompense for sums previously rendered under the style "front pay" can probably still be obtained by a plaintiff as a legal damage under the rubric "future pecuniary losses." 42 U.S.C. § 1981a(b)(3).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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In The
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUMMARY OF ARGUMENT

Respondent acknowledges that when Congress enacted the 1991 Civil Rights Act there was a widespread agreement among the lower courts that section 706(g) of Title VII authorized awards of front pay. In light of the explicit language of section 1981a(b)(2) excluding from compensatory damages any "relief authorized under section [706(g)]", the existence of that legal consensus is dispositive. The rule of Lorillard v. Pons, 434 U.S. 575 (1978), that legislation incorporating sections of prior statue incorporates as well the reigning interpretation of that statute, precludes reexamination of the correctness of the law prevailing in 1991.

Front pay is, indeed, authorized by section 706(g). Such awards fit easily within the general purpose of section 706 to "eliminate the effects of the past . . . discrimination." Albemarle Paper Co. v. Moody, 522 U.S. 405, 418 (1975). Front pay is, in essence, post-judgment backpay. Front pay is an equitable remedy for the same reason that backpay awards are equitable: "the district court retains substantial discretion as to whether or not to award [such relief.]" Id. at 433, (Rehnquist, J., concurring).

Section 1981a(b)(2) explicitly preserves the status and treatment of the Title VII remedies that existed prior to 1991. Section 1981a(c) did not, in authorizing jury trials where compensatory damages are sought, alter by implication the availability of those pre-existing remedies. The avowed intent of Congress in adopting the 1991 Act was to provide discrimination victims with "additional remedies". 105 Stat. 1071. It would pervert the intent of Congress to construe section 1981a(c), or section 1981a as a whole, to limit and in some instances (as here) eliminate the then well established remedy of front pay.

I. THE LANGUAGE OF SECTION 1981a PRECLUDES TREATING FRONT PAY AS PART OF COMPENSATORY DAMAGES

The central textual problem faced by respondent is to explain why subsection (b)(2), excluding from the scope of compensatory damages both back pay and "any other type of relief authorized by section [706(g)]", does not exclude front pay. A literal reading of subsection (b)(2) yields a sensible result entirely consistent with the legislative history of the statute. The new monetary remedies are generally subject to caps (to allay fears that awards for compensatory or punitive damages might be excessive) and to a statutory right to trial by jury (long sought by supporters of the legislation); because, however, neither side had any objections to the monetary relief that was already available under section 706(g), it remained unchanged.

Several of respondent's arguments simply ignore subsection (b)(2). Respondent asserts, for example, that "[t]he plain language of future pecuniary loss includes sums for future earnings, front pay." (R.Br. 11). But the interpretation of this statute requires consideration of the plain language of the entire law, not just of three words of one subsection. Respondent's contention does not address the plain language of subsection (b)(2), or even all the language of subsection (b)(3) itself, for respondent does not purport to deal with that portion of subsection (b)(3) explaining that it limits only "compensatory damages under this section." Respondent asserts no more than that the words "future pecuniary loss", considered in isolation, would include losses that are redressed by front pay. But Congress did not use this phrase in isolation. Rather, the words "future pecuniary losses" apply to and limit only those types of monetary relief that are not otherwise excluded from compensatory damages by subsection (b)(2), and subsection (b)(2) in turn excludes front pay from the scope of compensatory damages.

Respondent contends that subsection (b)(3) is of paramount consideration because it "conveys the real change in the organization of damages under the new remedies regime." (R.Br. 11). If the status of front pay has changed, it would assuredly be subsection (b)(3) that worked that alteration; but the question here is whether the 1991 Act alters the treatment of front pay at all. It is subsection (b)(2)which

provides the clearest, and assuredly negative, answer to that question.

Much of respondent's brief is directed at avoiding the problem created by subsection (b)(2) by seeking to show that front pay is not a "type of relief authorized under section [706(g)]." Each of its contentions suffers from the same fatal flaw; on the view of the law advanced by respondent, the other-authorized-relief clause of subsection (b)(2) would necessarily refer to nothing at all, and be completely meaningless.

Respondent and several amici argue that front pay is not within the scope of the other-authorized-relief clause of subsection (b)(2) because front pay is not "specifically authorized" by section 706(g) (emphasis added). Subsection (b)(2), however, excludes from compensatory damages "any . . . relief authorized" by section 706(g) (emphasis added), not relief "specifically authorized" by that section. This argument rests in part on an historical anachronism; section 706(g), enacted in 1964 and amended in 1972, could not have expressly referred to "front pay", that phrase apparently was not coined until 1977. (Pet. Br. 15 n. 8). Most fundamentally, the only type of monetary relief that is "specifically" authorized by section 706(g) is back pay. The other-authorized-relief clause by its express language can refer only to types of authorized relief other than back pay. Thus if as respondent suggests the other-authorized-relief clause means "types of relief other than back pay that are specifically authorized by section 706(g)", it would by definition refer to nothing at all.

Respondent argues as well that section 706(g) never authorized (specifically or otherwise) front pay or any other form of monetary relief except back pay, and that even if it did section 1981a repealed by implication any monetary remedies, other than back pay, previously available under section 706(g). Either argument, however, would remove all monetary relief save for back pay from the remedies authorized by section 706(g), leaving nothing in section 706(g) to which the other-authorized-relief clause of section 1981a(b)(2) could refer.

This Court has consistently refused to adopt an interpretation of a statute which would render a portion of the law utterly redundant. E.g., Hohn v. United States, 524 U.S. 236, 249 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 347 (1998); United States v. Menasche, 348 U.S. 528, 538-39 (1955). Respondent's proposed construction of section 1981a would be even less plausible. The other-authorized-relief clause would not duplicate the reference to backpay; it would have literally no meaning at all. This Court rejected a similar contention in United States v. Alaska, 521 U.S. 1 (1997). In that case section 6(e) of the Alaska Statehood Act had retained for the United States title to lands "withdrawn or otherwise set apart as refuges . . . for the protection of wildlife." 521 U.S. at 55. The Court rejected the conclusion of a Special Master that section 6(e) applied only to established wildlife refuges, but not to lands temporarily set apart pending resolution of a proposal for the creation of such a refuge.

> Under the Master's interpretation, § 6(e) applies only to completed reservations of land. But Congress did not limit § 6(e) to completed reservations. Rather, Congress provided that the United States would not transfer to Alaska lands "withdrawn or otherwise set apart as refuges" for the protection of wildlife. (Emphasis added). The Master's reading of §6(e) would render the broader terminology superfluous."

521 U.S. at 59.

II. SUBSECTION (b)(2) OF THE 1991 ACT CODIFIED THE THEN EXISTING LAW THAT FRONT PAY IS A FORM OF RELIEF AUTHORIZED BY SECTION 706(g)

Respondent properly acknowledges that as of 1991 there was a widespread, longstanding and virtually

unquestioned[1] consensus among the lower courts that front pay was among the remedies authorized by section 706(g). "Respondent does not contest that the lower courts have long considered front pay as a form of prospective relief." (R.Br. 13 n. 9).[2] We noted in our opening brief some forty-one pre-1991 circuit court opinions approving front pay. (Pet. Br. App. A). All of these decisions, respondent now insists, were in error. "[T]he early cases from the courts of appeals after the 1972 [amendments to the Civil Rights Act] are singularly deficient in analysis of their equity powers." (R.Br. 34 n. 38). "[T]he courts erroneously categorized front pay as

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[1] As of 1991--and indeed, to this day--no circuit court had ever held that front pay was not available under section 706(g). As we explained in our opening brief, the eleven circuits to reach this issue had all upheld such relief.

Respondent notes that before 1991 a single decision in the Seventh Circuit had noted that the question was as of then unresolved in that circuit. (R.Br. 22, citing McKnight v. General Motors Corp., 908 F. 2d 104, 116 (7th Cir. 1990), cert. denied, 499 U.S. 919 (1991)). Within a year of the adoption of the 1991 Act, however, the Seventh Circuit joined all the other circuits in holding that front pay awards were indeed within the discretion of the district court. McKnight v. General Motors Corp., 973 F. 2d 1366, 1369 (7th Cir. 1992). Decisions in the Seventh Circuit have been particularly emphatic in insisting that the pre-1991 availability of front pay means that such awards are not subject to the caps in section 1981a(b)(3). Pals v. Schepel Buick & GMC Truck, Inc., 220 F. 3d 495 (7th Cir. 2000); Williams v. Pharmacia, Inc., 137 F. 3d 944 (7th Cir. 1998); see R.Br. 14, 21.

[2] R.Br. 8 ("before 1991 many lower courts had held that . . . it was within their equitable power to grant . . . front pay"), 14 (referring to "moneys formerly awarded as 'front pay'"), 15 ("federal district judges did award front pay on an apparent theory that courts could fashion monetary remedies when reinstatement was deemed inappropriate"), 33 (after the adoption of the 1972 amendments to Title VII "courts began awarding front pay").

equitable relief." (R.Br. 33). Widespread though they were, "awards of front pay under section 706(g) were, prior to 1991, contrary to legislative intent." (R.Br. 33).

It is far too late in the day to reopen this question. This Court has repeatedly emphasized that "[w]hen . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581 (1978). That presumed knowledge is important precisely because Congress is deemed to have incorporated into the new law not only the text of the prior statute, but also the well established interpretations of that earlier law.

This Court deems Congress to be familiar with the law prevailing at the time when it acts, and construes new legislation accordingly, not only because this is a reliable and objective method of discerning congressional intent, but also because the failure to interpret statutes in this manner would utterly confound the legislative process. Congress cannot express its will in an effective and predictable manner unless the terms and phrases which it utilizes to frame legislation continue in subsequent years to be accorded the same meaning and legal significance that they had when the legislation was written. Where the popular usage of particular words has changed over time, this Court has been careful to construe the language of earlier legislation in light of contemporaneous meaning. E.g., St. Francis College v. Al-Khazraji, 481 U.S. 604, 610-12 (1987). The central purpose of the maxim of construction noted in Lorillard v. Pons is to assure that the courts will not, by reinterpreting after the fact an earlier statute on which Congress had relied, give to the later statute a meaning Congress did not intend. This Court has adhered to that principle even when members of the Court may have

disagreed with earlier interpretations on which Congress would have relied.[3]

Thus in a case such as this the intent of the Congress which adopted the 1991 Act is of controlling importance. In Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), in determining whether the Commodities Exchange Act authorized an implied cause of action, the Court considered only the state of the law, and thus presumed the congressional intent, when the statute had been extensively revised in 1974:

> [W]e must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy . . . . When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already

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[3] Cannon v. University of Chicago, 441 U.S. 677 (1979), and Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582 (1983), held in sharply divided opinions that an implied cause of action exists to enforce, respectively, Title IX and Title VI. Subsequently, in the Rehabilitation Act Amendments of 1986, Congress provided that in suits against a state under those statutes plaintiffs would have "such remedies [as] are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). The meaning of the 1986 legislation necessarily depended on what rights plaintiffs had against non-state defendants. Against that background, this Court emphatically refused to reconsider the correctness of the caselaw as it had stood in 1986, insisting that the 1986 legislation was a "validation" of then prevailing law. Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 72 (majority opinion), 78 (Scalia, J., concurring)(1992).

existed; the question is whether Congress intended to preserve the pre-existing remedy.

456 U.S. at 378-79 (footnote omitted). Merrill Lynch concluded that an implied cause of action existed because such actions under the CEA were "a part of the 'contemporary legal context' in which Congress legislated in 1974", 456 U.S. at 381, even though the Court might well have reached a different conclusion had it applied to the original CEA the more stringent legal standards established in 1975 by Cort v. Ash, 422 U.S. 66 (1975). This Court has applied this method of interpretation where the legal consensus existing at the time Congress acted had been established by lower court decisions. Lindahl v. OPM, 470 U.S. 768, 780 (1985); Lorillard v. Pons, 434 U.S. 575, 580 n. 7 (1978).

We noted in our opening brief that interpreting section 1981a to impose on front pay a cap that did not exist prior to 1991 would be squarely inconsistent with Congress' express intent that the 1991 Act provide "additional" remedies.[4] Respondent argues that all the pre-1991 front pay decision were in error, and that no front pay could properly have been awarded until Congress adopted the 1991 Civil Rights Act. On respondent's view the 1991 Act thus provided "additional" remedies because it authorized capped front pay where no front pay, at all, had previously been permissible. (R.Br. 33). But that assuredly was not how Congress would have

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[4] Such a result would be palpably inconsistent with section 2 of the Act, which provided in part:

"The Congress finds that--

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

* * *

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment."

101 Stat. 1071. (emphasis added).

understood the legislation at the time it was passed. In 1991, Congress could only have concluded (albeit, in respondent's view, mistakenly), that front pay was already available, and that any imposition of the subsection (b)(3) caps on front pay would thus reduce rather than expand existing remedies. Under Lorillard Congress is presumed to know the law prevailing at the time it legislates, not assumed to have had the prescience to anticipate that this Court might years later be persuaded to overturn a hitherto prevailing legal consensus.

Respondent's historical contentions present a compelling illustration of the dangers of departing from the principle of interpretation emphasized in Lorillard v. Pons. The task before this Court is to ascertain the intent of Congress in enacting the 1991 Civil Rights Act. Respondent urges this Court, however, to disregard the undisputed state of the law in 1991 regarding front pay, the unchallenged evidence that members of Congress in 1991 had actual knowledge of that accepted interpretation, and the unambiguous statements regarding the meaning of section 1981a made in 1991 by Senator Danforth and the other six Republican Senators who actually drafted and introduced section 1981a.[5] The correct interpretation of the 1991

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[5] Particularly where no committee reports exist, or address the meaning of legislation framed on the floor of the House or Senate, this Court has regularly relied on statements or memoranda placed in the record by the authors of the legislation or compromise. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 350-52 (1976).

Respondent dismissed repeatedly as "partisan" the views expressed by the eight Republican Senators who drafted section 1981a. (R.Br. 26 n. 28, 28). But in this instance those views were also expressly endorsed by the House and Senate Democrats who were managing the bill for their own party. Indeed, there is no dispute that every member of Congress who specifically discussed front pay agreed that it was not part

legislation, respondent insists, is instead to be divined by reading the 1765 Commentaries of Sir William Blackstone, Justice Story's Commentaries on Equity Jurisprudence (first published in 1835), and, most recently, legislation adopted by the British Parliament in 1858 at the behest of Baron (later Earl) Hugh McCalmont Cairns. (R.Br. 37-41). This entire approach is unsound. Regardless of whether Justice Story is, as respondent urges, "the maven of American equity jurisprudence" (R.Br. 37), the 1991 legislation at issue in this case was actually framed by Senators John Danforth, Arlen Specter, John Chaffee, William Cohen, James Jeffords, Dave Durenberger and Mark Hatfield, and was approved by the members of the 102nd Congress. It is their intent that is of controlling importance.

III. FRONT PAY IS A FORM OF RELIEF AUTHORIZED BY SECTION 706(g) OF TITLE VII

Even if this Court were to revisit the longstanding legal consensus regarding front pay, the result would be no different. The propriety of front pay awards under section 706(g) is readily apparent. The remedial principles governing monetary relief under section 706 were spelled out in this Court's decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975):

> It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice," Brown v. Swann, 10 Pet. 497, 503 (1836) . . . . Where racial discrimination is concerned, "the [district] court has not merely the power but

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of compensatory damages.

> the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). . . . The "make whole" purpose of Title VII is made evident by the legislative history.

422 U.S. at 418-19.

The Court noted that Congress, when it amended section 706(g) in 1972[6] to authorize "any other equitable relief as the court deems appropriate", had "strongly reaffirmed the 'make whole' purpose of Title VII." 422 U.S. at 421. Senator Williams' authoritative section-by-section analysis of the 1972 legislation explained:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [S]ection 706(g) . . . is intended to make the victims of unlawful discrimination whole, and . . . the attainment of that objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

422 U.S. at 421, quoting 118 Cong. Rec. 7168 (1972).

Measured against this standard, the propriety of front pay is clear. Where an individual has been denied, or dismissed from, a job because of race, gender, religion or national origin, the difference between the victim's

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[6] Respondent suggests that back pay was the only form of monetary relief authorized under Title VII when it was originally enacted in 1964. (R.Br. 31). In fact, however, section 706(g) broadly authorized the court to "order such affirmative action as may be appropriate, which may include . . . back pay." 78 Stat. 261.

subsequent income and the wage or salary he or she would have earned but for the discrimination is (assuming reasonable mitigation efforts have occurred) a "discriminatory effec[t] of the past." 422 U.S. at 418. An order directing the culpable defendant to pay a sum equal to that income differential is the classic example of make whole relief under Albemarle. Where that income differential occurred prior to the entry of judgment, the relief usually accorded under Title VII is denoted "backpay". But if the very same discriminatory effect continues after final judgment because reinstatement is delayed or impracticable, relief for that injury is warranted for precisely the same reason that it was warranted for the pre-judgment period. Although redress for the post-judgment period is denoted "front pay" rather than "backpay", it serves the identical make whole purpose, albeit for a different period of time.

The fact that front pay (like backpay) is a form of monetary relief does not, as respondent contends, mean that it cannot be "equitable relief" within the meaning of section 706(g). Albemarle explained that backpay is equitable because, unlike damages, the decision whether to make such awards remains a matter of discretion:

> [B]ackpay is not an automatic or mandatory remedy . . . . [T]he court's discretion is equitable in nature . . . . "[E]quity eschews mechanical rules . . . [and] depends on flexibility." Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes.

422 U.S. at 415-17. Then Justice Rehnquist emphasized that monetary relief under Title VII remained equitable so long as that discretion existed:

> To the extent . . . that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature

> of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. . . . If the award of backpay is indeed governed by equitable consideration, . . . factors . . . which may argue in favor of or against the equities of either plaintiff or defendants, must be open for consideration by the District Court. It . . . must avail itself "of the freedom given it by Congress to attain just results in diverse, complicated situations." Phelps Dodge Corp. v. NLRB, 313 U.S. [177], 198 [(1941)].

422 U.S. at 433-47 (concurring opinion). In Curtis v. Loether, 415 U.S. 189 (1974), the Court held in similar terms that the presence or absence of such discretion is of critical importance in determining whether monetary relief is equitable in nature.[7] Historically the existence of such flexibility has been one of the key characteristics which distinguished equity from actions at law.[8]

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[7] "In Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy . . . . [T]he courts have relied on the fact that the decision whether to award backpay is committed to the equitable discretion of the trial judge." 415 U.S. at 197.

[8] 1 Pomeroy's Equity Jurisprudence § 109 (2d ed. 1892):

> "The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances . . . . Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances . . . .[T]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case . . . ."

Respondent insists that all monetary relief is presumptively legal rather than equitable (R.Br. 17), that any monetary remedy is legal in nature if damages might have been awarded at law to redress the same injury (R.Br. 22), and that equitable restitution extends only to cases in which an employer has been unjustly enriched by the Title VII violation. (R.Br. 17). These contentions, however, are as applicable to backpay as to front pay, and do not provide a basis for concluding that only the former is available under section 706(g). Front pay is in essence post-judgment backpay. In some respects front pay is even more clearly equitable in nature than backpay. Front pay is often intertwined with injunctive relief, such as where the court orders front pay until a plaintiff is reinstated, or does so for the purpose of providing an incentive for reinstatement. Ordinarily the fact that a remedy is prospective in nature makes it unlike damages. Compare Milliken v. Bradley, 433 U.S. 267, 288-90 (1977), with Edelman v. Jordan, 415 U.S. 651, 668 (1974). This Court need not address whether front pay and backpay are "equitable" for Seventh Amendment purposes; it is enough that Congress assuredly intended to treat the two remedies alike.

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1 Story's Equity Jurisprudence § 28 (14th ed. 1918):

> "[O]ne of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and may adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law . . . are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant."

Front pay fits easily into Albemarle's delineation of the type of monetary relief that is equitable[9]--both equitable within the meaning of section 706(g) and equitable under the Seventh Amendment.[10] As we explained in our opening brief, the decision whether to award front pay has always been a matter of discretion. (Pet. Br. 40-41 and App. C). As a practical matter, courts have routinely exercised their equitable discretion to deny front pay. Respondent does not contend that front pay awards have ever been mandatory. The lower courts have construed Title VII only to accord to the trial courts the "power" to award front pay (R.Br. 8, 15), not to create an absolute duty to do so; where reinstatement is not possible, front pay awards have been made "sometimes" (R.Br. 3) or "often" (R.Br. 4), but assuredly not always. In the instant case, we do not urge that a finding on remand that reinstatement is not possible would ipso facto entitle petitioner

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[9] Albemarle makes clear that even a lump sum front pay order is equitable in nature. Regardless of the status of such lump sum orders, there is no question that a court would be using its equitable powers if it issued a prospective injunction directing an employer to pay to a discrimination victim a specified sum per month until reinstatement was possible, or if the court simply retained jurisdiction and periodically issued additional back pay orders. Respondent does not address whether such orders would be equitable, or whether they would be subject to the subsection (b)(3) caps.

[10] Respondent contends that its construction of the 1991 Civil Rights Act is necessary to avoid a constitutional problem. (R.Br. 15). In light of Albemarle, however, there is little merit to respondent's argument that the Seventh Amendment requires that a jury award front pay. Even if the Seventh Amendment does apply to front pay awards, that would not render Title VII or the 1991 Act unconstitutional. Neither statute forbids jury trials regarding monetary claims (e.g., backpay) that are not part of compensatory damages. And there is assuredly no Seventh Amendment issue in the instant case, in which neither party requested a jury at all.

to front pay; such a determination would merely provide the district court with an occasion to exercise its discretion regarding front pay in the manner contemplated by Albemarle.

That backpay and front pay are equally available under section 706(g) is illustrated by the circumstances of this case. Petitioner was terminated in February 1996, and continues to this day to be denied the $60,000 annual salary she would have earned had the proven Title VII violation not occurred. In its August 1998 decision the district court awarded petitioner backpay for the period from February 1996 through August 1998. Respondent characterizes such backpay orders as equitable because they have "the function of restoring money unlawfully withheld since employment termination." (R.Br. 18). But in the period since the district court opinion, DuPont has continued to withhold the money it would have paid petitioner but for the discriminatory dismissal. If the district court were to decide the instant case today, rather than having done so in 1998, petitioner could unquestionably obtain backpay for the years from 1998-2001, as well as for 1996-1998. An award of the same amount of relief for the same period in time is no less equitable in character merely because the trial court's liability determination occurred in 1998 rather than in 2001. Wherever the distinction may lie under either section 706(g) or the Seventh Amendment between relief that is and is not equitable in nature, the distinction assuredly does not depend on the fortuity of when the district court's opinion was entered.

The fact that section 1981a(c) now authorizes[11] jury trials where compensatory or punitive damages are sought does not, as respondent contends, transform front pay from equitable relief under section 706(g) into a form of compensatory damages. Having in subsection (b)(2) expressly sought to preserve the status of existing section 706(g) remedies, Congress cannot in adopting subsection (c) have intended solely by implication to bring about the opposite result. Many provisions of the 1991 Civil Rights Act were indeed adopted for the express purpose of overturning judicial decisions with which Congress disagreed. But when that was Congress's intent, it specified the decisions which it was overturning, and explained its reasons for doing so. There is absolutely nothing in the voluminous legislative history of the Act reflecting the slightest disagreement with the then prevailing caselaw regarding front pay. The stated purposes of the Act in this regard is limited to "respond[ing] to recent decisions of the Supreme Court." 105 Stat. 1071. No mention is made of responding to any circuit court opinions.

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[11] Section 1981a does not, as respondent repeatedly asserts, direct that all claims for compensatory damages be decided by a jury. (R.Br. 8, 9, 10, 15, 16). The statute merely authorizes any party to demand a jury trial where compensatory damages are sought. In the instant case, of course, neither party did so. Section 1981a would have no application if a plaintiff only sought relief under section 706(g). Even where a plaintiff sought both front pay and damages, and a jury trial was requested on most issues, it would not follow that either party would want the jury to determine front pay. Our review of the reported cases involving front pay indicates that this does not occur.

IV. RESPONDENT'S PROPOSED INTERPRETATION OF TITLE VII WOULD ENTAIL FUNDAMENTAL CHANGES IN THE AVAILABLE REMEDIES WHICH CONGRESS DID NOT INTEND AND WHICH NO MEMBER OF CONGRESS EVER ADVOCATED

Respondent proposes sweeping change regarding front pay. Although respondent's immediate concern is with the subsection (b)(3) caps, it correctly understands that the other-authorized-relief provision of subsection (b)(2) cannot be circumvented without a sea change in the treatment of front pay. Respondent's brief, expressly and of necessity, entails five distinct alterations in existing law.

First, respondent urges that front pay should be subject to the subsection (b)(3) caps. In cases where damages for pre-judgment injuries already exceed the cap, front pay would be abolished. In cases where the front pay awardable under pre-1991 law would have exceeded the cap, the amount of that award would now be reduced.

Second, respondent insists that the award of front pay is entirely a matter for the jury. (R.Br. 7-10). Respondent does not advance the hybrid theory propounded by the Sixth Circuit in Hudson v. Reno that the court should decide whether front pay should be awarded, while the jury decides only the amount of front pay.

Third, respondent insists that front pay was never a permissible remedy under section 706(g), and only became available when Title VII was amended to authorize compensatory damages. (R.Br. 16-23). Were this Court to so hold, front pay would as a consequence be impermissible in cases under Title VII, as well as under Title I of the Americans With Disabilities Act, for violations that do not involve intentional discrimination. E.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (job requirement with discriminatory effect); 42 U.S.C. § 12112(b)(5)(requiring employer to reasonably accommodate disabled employee). In these cases the only prospective remedy that a court could afford to a plaintiff who had been unlawfully dismissed from

or denied a job would be to order reinstatement, even though that often would require displacing an existing employee.

Fourth, respondent insists that front pay relief which in the past would have been discretionary must now be treated as common law compensatory damages, a change which would make such monetary awards mandatory whenever past discrimination would in fact cause future, post-judgment wage losses. See Smith v. Wade, 461 U.S. 30, 52 (1983)("Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss"). Plaintiffs who have requested a jury trial, respondent correctly observes, have "the right to have a jury award compensatory damages" for injuries caused by unlawful discrimination. (R.Br. 9).

Fifth, if the Court were to hold, as respondent urges, that front pay is inherently a form of legal relief, that would have substantial consequences for discrimination cases brought under 42 U.S.C. § 1981 (for race discrimination) and § 1983 (for unconstitutional discrimination). In those cases as well front pay awards would now be mandatory, juries (if requested) rather than judges would award them, and there would be no statutory cap on those now obligatory awards.

There is nothing in the text or legislative history of section 1981a to suggest that Congress favored or even considered making any such changes. The jury trial provision which respondent asserts assured this sea change was present in the earliest version of the bill in February, 1990.[12] Until the sponsors agreed in October 1991 to caps on compensatory damages, converting front pay to a form of compensatory damages would have changed Title VII in a manner entirely unfavorable to employers. The opponents of the legislation would assuredly have objected vociferously had they understood the proposed legislation to have any such effect; the proponents of these bills, although entirely outspoken in successfully urging adoption of a number of statutory changes

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[12] S. 2104, 101st Cong., 2d Sess. § 8.

favorable to Title VII plaintiffs, never claimed that they wanted to make front pay mandatory or to transfer its administration to juries. The absence of such objections or arguments confirms that subsection (b)(2) meant precisely what it said--that then existing section 706(g) remedies, including front pay, remained unaffected.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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No. 00-763

In the Supreme Court of the United States

SHARON B. POLLARD, PETITIONER

v.

E.I. DUPONT DE NEMOURS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an award of front pay in an action brought under Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, is subject to the cap on compensatory and punitive damages established by the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(3).

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), prohibits employment discrimination by both public and private employers on the basis of race, color, religion, sex, or national origin, and authorizes equitable remedies against both public and private employers. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-1074 (42 U.S.C. 1981a), authorized, in cases of intentional discrimination, the additional remedies of compensatory damages and (in suits against private employers) punitive damages, subject to a cap on the total amount of damages awarded. See 42 U.S.C.

1981a(a)(1) and (b)(1)-(3). The Equal Employment Opportunity Commission (EEOC) is authorized to enforce Title VII against private employers, and participated as amicus curiae in the court of appeals. The Attorney General is authorized to enforce Title VII against public employers. See 42 U.S.C. 1981a(d)(1), 2000e-5(a) and (f). This case presents the question whether front pay—which makes the plaintiff whole for earnings that would have been received had she been reinstated immediately after a finding of liability—is an equitable remedy when awarded under Title VII, or instead a damages remedy subject to the statutory cap. The Court's determination of the proper categorization of front pay is likely to affect both the EEOC and the Attorney General in their enforcement of Title VII.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title VII and the Civil Rights Act of 1991—42 U.S.C. 2000e-5(g) and 42 U.S.C. 1981a, respectively—are set forth in an appendix to this brief. App., *infra*, 29a-35a.

STATEMENT

1. Petitioner worked for respondent from 1977 until respondent terminated her in 1996. Pet. App. 3a; App., *infra*, 2a, 19a.[1] In 1987, petitioner was promoted to the position of "operator" in the peroxide department of respondent's chemical plant in Memphis, Tennessee. Pet. App. 3a; App., *infra*, 2a. The district court found that "[i]t was common knowledge among the employees in the peroxide area that * * * many of the * * *

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[1] The petition appendix contains only a portion of the district court's opinion. The opinion is reproduced in full in Appendix A, *infra*.

men in the area, did not approve of women working in peroxide." App., *infra*, 5a; see Pet. App. 5a.[2]

In February 1994, petitioner agreed to give a talk to a group of girls visiting the Memphis plant as part of respondent's participation in the national Take Your Daughters to Work Day program. Pet. App. 4a. Another operator named Steve Carney strongly objected to Take Your Daughters to Work Day and instructed all of the men on petitioner's shift not to eat with petitioner, not to share food with her, not to be in the break room with her, not to talk to her, and not to accept directions from petitioner without first consulting him. *Ibid.*; App., *infra*, 4a-5a.

In the summer of 1994, Carney, who was in charge of the peroxide department's control room, began setting off false alarms in petitioner's area of the plant. The false alarms required petitioner to search a work area the size of three city blocks for non-existent problems. Pet. App. 6a; App., *infra*, 8a-9a & n.7. This was Carney's "way of showing that he, a man, was in control." Pet. App. 6a. If a false alarm sounded while petitioner was on break cooking her dinner, male employees would sometimes turn up the stove to burn her food while she searched for a problem. *Ibid.*; App., *infra*, 8a. Carney also failed to inform petitioner of actual alarms, thus creating an appearance that petitioner was not performing her duties. Pet. App. 6a.

On approximately seven occasions in 1994 and 1995, Carney ordered assistant operators to remove vaporizers from peroxide tanks earlier than petitioner had instructed, without telling petitioner. Pet. App. 6a-7a.

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[2] Several male employees in the peroxide department routinely referred to petitioner and other women as "bitches," "cunts," "heifers," and "split tails." Pet. App. 5a; App., *infra*, 5a-6a.

Early removal of the vaporizers could result in a shortfall of peroxide production. App., *infra*, 9a-10a & n.8. When petitioner learned that Carney was ordering removal of vaporizers, she spoke with the shift supervisor, David Swartz, about the problem. Carney blamed petitioner, and Swartz took no action. Pet. App. 7a; App., *infra*, 10a-11a.

During the summer of 1994, someone slashed the tires on petitioner's bicycle while it was parked in the peroxide area. Petitioner told Swartz that she suspected Carney. Carney denied slashing the tires, and Swartz did not investigate further. Pet. App. 7a.

In December 1994, two male employees asked Swartz to call a meeting to discuss the men's treatment of petitioner. Pet. App. 7a. Carney was absent from work on the day of the meeting, and two male employees stated in Swartz's presence that Carney had encouraged the men not to speak with petitioner. *Id.* at 7a-8a; App., *infra*, 12a. When Carney returned to work, he demanded another meeting. At that meeting, and again in Swartz's presence, Carney "got in [petitioner's] face" and told her "Nobody in this area likes you, you're here all alone, it's all your own fault." Pet. App. 8a. When petitioner appealed to Swartz, Swartz ended the meeting. *Ibid.*

The problems continued, and petitioner complained to Swartz and to attendees at company "Women's Network" meetings. Swartz's supervisor, Beth Basham, attended the Women's Network meetings. Pet. App. 8a. Basham acknowledged at trial that she was aware of the problems and that she believed petitioner was harassed on account of her sex. Yet Basham never investigated petitioner's complaints. *Id.* at 8a-9a; App., *infra*, 14a-15a, 26a.

In July 1995, petitioner asked to be transferred to another shift. Petitioner was offered a job working with a man who had in the past refused to take orders from petitioner because she is a woman, and who had placed on petitioner's desk the biblical passage: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Pet. App. 10a; *id.* at 3a-4a; see also 1 *Timothy* 2:11-12. Petitioner declined that reassignment and, after discovering a highlighted copy of the same Bible verse in her locker, she requested a medical leave of absence. Pet. App. 10a.

After petitioner's departure, the employees on her old shift, including Swartz, held a party with balloons and a fish fry to celebrate. Pet. App. 11a. Respondent investigated the second Bible verse incident by asking the men in the peroxide area (singly or in groups) a set of "yes" or "no" questions. When no one admitted knowledge of the incident, respondent ended the investigation. *Id.* at 10a-11a; App., *infra*, 17a.

After petitioner had been on short-term disability leave for six months, respondent, rejecting the opinion of a company psychologist who determined that petitioner could not return to work, scheduled a "return to work" meeting. Pet. App. 11a; App., *infra*, 18a-19a. Company managers refused to guarantee that petitioner would not be placed on a shift with Carney, and petitioner refused to return to work under those circumstances. Respondent then fired petitioner. Pet. App. 11a.

2. After a bench trial, the district court found that respondent subjected petitioner to a hostile work environment because of her gender, in violation of Title VII. App., *infra*, 19a-25a. The district court described the case as one "of wretched indifference to an em-

ployee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched." *Id.* at 27a.

The district court awarded petitioner $107,364 in back pay and accrued benefits, $300,000 in compensatory damages, and $252,997 in attorney's fees. App., *infra*, 27a-28a; Pet. App. 2a. The award of $300,000 in compensatory damages was the maximum amount allowable under 42 U.S.C. 1981a(b)(3), which establishes a statutory cap for compensatory and punitive damages awards that ranges from $50,000 for employers with between 14 and 101 employees, to $300,000 for employers (such as respondent) with more than 500 employees. The district court included an amount for front pay within the compensatory damages award. See App., *infra*, 27a-28a n.19.[3] The court explained that it treated the front pay award as compensatory damages because it was required to do so by *Hudson* v. *Reno*, 130 F.3d 1193, 1204 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998). The court stated, however, that when front pay was included, the capped damages award of $300,000 was "insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement." App., *infra*, 27a-28a n.19. The district court also noted that the cap prevented it from making an additional award of punitive damages, even though punitive damages were justified "as [respondent] has 'engaged in a discriminatory practice with malice or with reckless indifference

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[3] See generally *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 953-954 (7th Cir. 1998) ("Front pay gives the employee the earnings she would have received had she been reinstated to her old job [after a finding of liability].").

to the federally protected rights of [petitioner].'" *Id.* at 28a n.19 (quoting 42 U.S.C. 1981a(b)(1)).

3. The court of appeals affirmed. The court rejected respondent's claim that the abuses petitioner suffered did not amount to sex-based harassment, finding "overwhelming" record evidence that petitioner suffered "severe and pervasive" harassment based on anti-female animus. Pet. App. 12a-14a. The record also supported the district court's conclusion that respondent "did not [make] a 'good faith' effort to remedy the situation." *Id.* at 15a-16a. The court of appeals rejected respondent's argument that the abuses suffered by petitioner were retaliation for her complaints to management, rather than sexual harassment. *Id.* at 16a. And, the court of appeals concluded that petitioner was not required to prove economic disparate treatment in order to recover under Title VII, given that she had established a hostile work environment based upon gender. *Id.* at 16a-17a.

The court of appeals found no merit in respondent's allegation of judicial bias. Pet. App. 18a-20a. The "anger and moral outrage" displayed by the district court late in the trial "stemmed from the conclusions which the judge had rightly formed as part of his factfinding duty" during the presentation of evidence. *Id.* at 19a-20a. Finally, the court of appeals affirmed the award of attorney's fees to petitioner. *Id.* at 20a.

The court of appeals rejected petitioner's cross-appeal challenging the district court's application of Section 1981a(b)(3)'s cap on compensatory and punitive damages to front pay, which reduced the amount of compensatory damages awarded and precluded punitive damages. Pet. App. 21a-22a. The court of appeals stated that it agreed with petitioner, with the EEOC as amicus curiae, and with all other courts of appeals to

consider the issue, that front pay is not subject to the cap. *Ibid.* (citing, *inter alia*, *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-1349 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir.), cert. denied, 528 U.S. 813 (1999); *Kramer* v. *Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 625-626 (8th Cir. 1998)). The court of appeals determined, however, that its "hands are tied" by the earlier panel opinion in *Hudson* v. *Reno*. Pet. App. 22a. In light of *Hudson*, the court of appeals affirmed the district court's ruling that front pay must be included in the capped $300,000 damages amount. *Ibid.*[4]

The court of appeals denied cross-petitions for rehearing or rehearing en banc. Pet. App. 49a-50a.

SUMMARY OF ARGUMENT

1. Before 1991, Title VII authorized only equitable relief pursuant to 42 U.S.C. 2000e-5(g). The Civil Rights Act of 1991 (1991 Act), however, made compensatory and punitive damages available under specified circumstances, "in addition to any relief" previously authorized by Section 2000e-5(g). 42 U.S.C. 1981a(a)(1). Congress capped the amount of compensatory and punitive damages that could be awarded under the 1991 Act, but defined "compensatory damages" to exclude "any * * * type of relief authorized under section

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[4] The court of appeals also rejected petitioner's arguments, not presented in the petition for certiorari, that Section 1981a's cap on compensatory and punitive damages violates the constitutional doctrine of separation of powers and denies certain plaintiffs equal protection. See Pet. App. 22a-24a. The court of appeals reversed the district court, however, with respect to its grant of summary judgment for respondent on petitioner's claim of intentional infliction of emotional distress. *Id.* at 24a-26a.

[2000e-5(g)]." 42 U.S.C. 1981a(b)(2). Accordingly, the 1991 Act's cap on damages does not limit a court's ability to award equitable relief under Section 2000e-5(g).

2. Congress drafted the 1991 Act against the background of consistent judicial rulings that front pay is a permissible equitable remedy under Section 2000e-5(g). When Congress stated in 42 U.S.C. 1981a(b)(2) that compensatory damages "shall not include * * * any * * * type of relief authorized under section [2000e-5(g)]," it incorporated the established understanding that front pay was one such authorized type of relief. The 1991 Act, moreover, did not amend the language of Section 2000e-5(g) that authorizes front pay. All courts of appeals to consider the issue, other than the Sixth Circuit, have held that front pay remains available as an equitable remedy after the 1991 amendments.

The Sixth Circuit's conclusion in *Hudson* v. *Reno*, 130 F.3d 1193 (1997), cert. denied, 525 U.S. 822 (1998), that front pay is a form of compensatory damages subject to the 1991 Act's cap on damages, was incorrect. In reaching that conclusion, the Sixth Circuit failed to give effect to Congress's explicit statement, in Section 1981a(b)(2), that the capped compensatory damages awarded under Section 1981a do not include equitable remedies authorized by Section 2000e 5(g). All other courts of appeals to consider *Hudson*'s reasoning have rejected it, and even the Sixth Circuit panel in this case concurred that *Hudson* reflects a mistaken application of the 1991 Act. See Pet. App. 22a.

3. The committee reports and legislative debates on the 1991 Act confirm that Congress intended to *supplement* the equitable remedies historically available under Title VII, not to limit them. During the debates,

legislators specifically noted that front pay was an existing Title VII remedy that would not be treated as a species of "compensatory damages" under the new law. Construing the 1991 amendments as placing a new restriction on the pre-existing front pay remedy would frustrate Congress's objectives of making victims of employment discrimination more nearly whole, enhancing the deterrent effect of Title VII, and encouraging private enforcement. Indeed, that reading of the 1991 law would make some victims of intentional employment discrimination worse off than they would have been if Congress had not authorized supplemental damages remedies.

Consistent with the text and legislative history of the 1991 Act, the EEOC determined in 1992 that Section 1981a's cap on damages does not apply to front pay awards. The EEOC has consistently adhered to that construction of the 1991 Act, and its interpretation provides additional guidance for the Court.

ARGUMENT

FRONT PAY AWARDS IN TITLE VII CASES ARE NOT SUBJECT TO THE CAP ON COMPENSATORY AND PUNITIVE DAMAGES ESTABLISHED BY 42 U.S.C. 1981a

A. Equitable Remedies That Are Available Under 42 U.S.C. 2000e-5(g) Are Not Subject To The Cap On Damages

Before 1991, the statutory remedies for employment discrimination based on race, color, religion, sex, or national origin in violation of Title VII did not include compensatory or punitive damages. Section 706(g) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261, which is codified as amended as 42 U.S.C. 2000e-5(g), limited available remedies to back pay,

injunctions, and other equitable relief. See *United States* v. *Burke*, 504 U.S. 229, 238 (1992).[5] Title VII "focuse[d] on 'legal injuries of an economic character,'" and the corresponding remedies consisted of restoring victims of discrimination "to the wage and employment positions they would have occupied absent the unlawful discrimination." *Id.* at 239 (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975)).

The 1991 Act made "a marked change" in the scope of the injury redressable through Title VII. *Burke*, 504 U.S. at 241 n.12. The 1991 Act added a new provision, 42 U.S.C. 1981a, that allowed a successful Title VII plaintiff who is not eligible to recover under 42 U.S.C. 1981[6] to recover, "in addition to any relief" previously authorized by Section 2000e-5(g), (1) compensatory damages in cases of intentional discrimination (but not cases of disparate impact), and (2) punitive damages in cases of malice or reckless indifference to federally protected rights by a private employer. 42 U.S.C. 1981a(a)(1) and (b)(1); see generally *Landgraf* v. *USI*

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[5] Section 2000e-5(g) provided before 1991, and provides today, that in the event of a successful claim,

> the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate.

App., *infra*, 29a; see 42 U.S.C. 2000e-5(g) (1988).

[6] Section 1981 authorizes compensatory and punitive damages for race discrimination that is actionable under that provision. See generally *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175-188 (1989) (discussing scope of Section 1981 in employment context); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975).

Film Prods., 511 U.S. 244, 252-255 (1994) (discussing 1991 Act's "major expansion in the relief available to victims of employment discrimination"); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 533-534 (1999) (same).

In authorizing the new damages remedies, Congress placed a cap on the amount of compensatory and punitive damages a plaintiff could recover. 42 U.S.C. 1981a(b)(3). That cap limits "[t]he sum of the amount of compensatory damages awarded under [Section 1981a] for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under [Section 1981a]" to between $50,000 and $300,000, depending upon the size of the employer's workforce. 42 U.S.C. 1981a(b)(3).[7]

At the same time, Congress expressly provided that the availability of compensatory damages, subject to the cap, would not affect or overlap the availability of traditional equitable remedies under Section 2000e-5(g).[8] Section 1981a(b)(2), entitled "Exclusions from compensatory damages," states: "Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act

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[7] Although damages recovery for future pecuniary losses is subject to the cap established by Section 1981a(b)(3), damages recovery for past pecuniary losses is not. See generally, EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991*, at 4-5 <http://www.eeoc.gov/docs/damages.html> (effective July 14, 1992) (*reprinted* in 8 Fair Empl. Prac. Man. (BNA) 405:7091 (1992)).

[8] There was no issue of overlap between punitive damages and the "make whole" equitable relief available under Section 2000e-5(g).

of 1964 (42 U.S.C. 2000e-5(g))." 42 U.S.C. 1981a(b)(2). Accordingly, the cap on certain damages awarded under Section 1981a does not affect a court's ability to award "any other type of relief" that is available as an equitable remedy under Section 2005e-5(g).

B. Front Pay Is Authorized Under Section 2000e-5(g)

Front pay is a type of equitable relief available to plaintiffs in Title VII cases under Section 2000e-5(g). Front pay therefore is exempt from the cap on compensatory and punitive damages awarded under Section 1981a, contrary to the holdings of the district court and the court of appeals in this case.

1. Front pay commonly is awarded in Title VII cases when the court determines that reinstatement—an equitable remedy specifically authorized by Section 2000e-5(g)(1)—is not viable for a reason such as extreme hostility between the plaintiff and the employer or its workers, or psychological injuries suffered by the plaintiff as a result of the discrimination.[9] Front pay is also awarded to cover wages foregone during the period between an order of reinstatement and actual reinstatement, which may be prolonged if, for example, no suitable position is vacant.[10] By 1991, every court of appeals to rule on the issue had approved front pay

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[9] See, *e.g.*, *Gotthardt* v. *National R.R. Passenger Corp.*, 191 F.3d 1148, 1155-1156 (9th Cir. 1999) (medical and psychological condition); *Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) (hostility), cert. denied, 484 U.S. 1047 (1988); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (same).

[10] See, *e.g.*, *Anderson* v. *Group Hospitalization, Inc.*, 820 F.2d 465, 473 (D.C. Cir. 1987); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 267-270 (4th Cir.), cert. denied, 429 U.S. 920 (1976).

awards under Section 2000e-5(g), or held more generally that front pay in lieu of reinstatement is an equitable remedy.[11] Those courts typically reasoned that front pay "is the monetary equivalent of the equitable remedy of reinstatement," and, when awarded as a substitute for reinstatement, is itself an equitable remedy. *Blum* v. *Witco Chem. Corp.*, 829 F.2d 367, 383 (3d Cir. 1987); see *Teamsters* v. *Terry*, 494 U.S. 558, 571 (1990) ("a monetary award incidental to or intertwined with injunctive relief may be equitable" in nature) (internal quotation marks omitted).[12]

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[11] See, *e.g.*, *Thompson* v. *Sawyer*, 678 F.2d 257, 292 (D.C. Cir. 1982); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 615-616 (1st Cir. 1985) (applying Age Discrimination in Employment Act (ADEA), but relying on Title VII case law); *Barbano* v. *Madison County*, 922 F.2d 139, 146-147 (2d Cir. 1990); *Blum* v. *Witco Chem. Corp.*, 829 F.2d 367, 383 (3d Cir. 1987); *Patterson*, 535 F.2d at 269 (4th Cir.); *Walsdorf* v. *Board of Comm'rs*, 857 F.2d 1047, 1054 (5th Cir. 1988); *Shore* v. *Federal Express Corp.*, 777 F.2d 1155, 1159-1160 (6th Cir. 1985); *Morgan* v. *Arkansas Gazette*, 897 F.2d 945, 954 (8th Cir. 1990) (ADEA case); *Thorne* v. *City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Fitzgerald*, 624 F.2d at 957 (10th Cir.); *Nord* v. *United States Steel Corp.*, 758 F.2d 1462, 1473-1474 (11th Cir. 1985); see also *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 116-117 (7th Cir. 1990) (reserving question of availability of front pay under Title VII), cert. denied, 499 U.S. 919 (1991). Commentators assumed as well that Title VII authorized front pay. See, *e.g.*, Mack A. Player, *Employment Discrimination Law* § 5.66, at 438 (1988) (stating that "the court should order" front pay covering the period "until the defendant offers substantially equivalent employment").

[12] In accordance with the plaintiff's duty to mitigate damages, courts calculate front pay by determining the present value of future earnings from the job to which the plaintiff ordinarily would have been reinstated, less the earnings the employee is receiving or would be expected to receive from a new job. See *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 954 (7th Cir. 1998); see also

Decisions of this Court confirm that front pay was regarded as an available remedy under Section 2000e-5(g) before the 1991 amendments. The Court noted in at least two cases that, before passage of the 1991 Act, front pay might be awarded as an equitable remedy under Section 2000e-5(g). *Burke*, 504 at 239 n.9 ("Some courts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover 'front pay' or future lost earnings."); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777 n.38 (1976) (recognizing "the possibility of an award of monetary damages (sometimes designated 'front pay')"); see *id.* at 781 (Burger, C.J., concurring in part and dissenting in part) ("An award such as 'front pay' could replace the need for competitive-type seniority relief."); see also *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 360-362 (1995) (suggesting that front pay would sometimes be appropriate equitable relief under the ADEA, albeit not when the employee has engaged in wrongdoing). More broadly, the Court had held that Section 2000e-5(g) granted the courts "full equitable powers" to make whole those persons who suffer injuries on account of prohibited employment discrimination.

Barbour v. *Merrill*, 48 F.3d 1270, 1279-1280 (D.C. Cir. 1995) (discussing factors relevant to establishing amount of front pay award), cert. granted in part, 516 U.S. 1086, and dismissed, 516 U.S. 1155 (1996); *Cassino*, 817 F.2d at 1347 (reversing front pay award covering full period from trial to expected retirement). As a practical matter, therefore, front pay is awarded in lieu of reinstatement "where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment." *Powers* v. *Grinnell Corp.*, 915 F.2d 34, 42-43 (1st Cir. 1990) (quoting *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984)).

Albemarle Paper Co., 422 U.S. at 418. Congress's grant of "broad equitable discretion" thus empowered district courts "to fashion such relief as the particular circumstances of a case may require to effect restitution," including relief related to future earnings. *Franks*, 424 U.S. at 763-766 & n.21.

When Congress stated in Section 1981a(b)(2) that compensatory damages "shall not include" any type of equitable relief authorized under Section 2000e-5(g), it legislated against that uniform understanding that front pay was an available equitable remedy. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979). The presumption that Congress knows the law is particularly apt in the case of the 1991 Act, because the Act was in large part a response to judicial decisions. See *Landgraf*, 511 U.S. at 250-251 (discussing decisions and congressional response); *Cannon*, 441 U.S. at 697-698. If Congress had not agreed with the courts of appeals that front pay is a permissible equitable remedy under Section 2000e-5(g), it surely would have addressed the issue when making direct reference to the existing remedies. Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 792, 804 n.4 (1998) (holding that "the force of precedent" associated with *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), was "enhanced" due to Congress's failure to overturn that decision in the 1991 Act).

Congress's establishment in Section 1981a of new damages remedies "in addition to any relief [previously] authorized," 42 U.S.C. 1981a(a)(1), did not alter the

availability of front pay under Section 2000e-5(g). Just as "the new compensatory damages provision of the 1991 Act is 'in addition to,' and does not replace or duplicate, the back-pay remedy allowed under prior law," *Landgraf*, 511 U.S. at 253, so too the new damages provision is in addition to, and does not replace or duplicate, the front-pay remedy also allowed under prior law. See pp. 20-23, *infra* (discussing legislative history of 1991 Act). All courts of appeals to consider the issue, aside from the Sixth Circuit, accordingly have continued to approve awards of front pay as an equitable remedy under Section 2000e-5(g), notwithstanding the availability of compensatory damages under Section 1981a.[13]

2. The court of appeals in this case agreed with our analysis, but *Hudson* v. *Reno*, 130 F.3d 1193 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998), compelled it to treat front pay as a compensatory damages remedy subject to the cap on damages. Pet. App. 21a-22a. *Hudson*, however, misapplied Section 1981a—as every other circuit to consider the issue has held.[14]

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[13] See, *e.g.*, *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-1349 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000); *Lussier* v. *Runyon*, 50 F.3d 1103, 1107-1108 (1st Cir.), cert. denied, 516 U.S. 815 (1995); *Hadley* v. *VAM P T S*, 44 F.3d 372, 375-376 (5th Cir. 1995); *Williams*, 137 F.3d at 952-954 (7th Cir.); *Gotthardt*, 191 F.3d at 1153-1154 (9th Cir.); *McCue* v. *Kansas Dep't of Human Res.*, 165 F.3d 784, 791-792 (10th Cir. 1999); *EEOC* v. *W&O, Inc.*, 213 F.3d 600, 618-619 (11th Cir. 2000).

[14] See *Martini*, 178 F.3d at 1348-1349 (D.C. Cir.); *Pals* v. *Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-500 (7th Cir. 2000); *Kramer* v. *Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 625-626 (8th Cir. 1998); *Gotthardt*, 191 F.3d at 1154 (9th Cir.); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir.), cert. denied, 528 U.S. 813 (1999); *W&O, Inc.*, 213 F.3d at 619 n.10 (11th Cir.).

The *Hudson* panel acknowledged "that prior to the enactment of the 1991 Civil Rights Act, many courts, including the Sixth Circuit, routinely awarded 'front pay' as an alternative to reinstatement in Title VII actions." 130 F.3d at 1203. The recognition that front pay was established as a remedy available under Section 2000e-5(g) when Congress drafted the 1991 amendments should have ended the court of appeals' inquiry into whether front pay is subject to the cap on compensatory and punitive damages.

The *Hudson* panel nevertheless reasoned that the 1991 amendments required it to decide whether front pay is better characterized as "compensatory damages awarded * * * for future pecuniary losses," and thus subject to the cap under Section 1981a(b)(3), or as equitable relief exempt from the cap pursuant to Section 1981a(b)(2). See 130 F.3d at 1203. The panel concluded that front pay can be described as compensatory damages for future pecuniary losses, and, indeed, the amount of front pay awarded under other statutes is sometimes determined by the jury. *Id.* at 1203-1204.[15] On that basis, the panel concluded that front pay should be subject to the damages cap. *Ibid.*

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[15] Lower courts disagree whether a jury or the judge should determine the appropriate amount of front pay in some discrimination contexts. See *Newhouse* v. *McCormick & Co.*, 110 F.3d 635, 642-643 (8th Cir. 1997) (discussing cases in ADEA context). Although the *Hudson* panel cited an earlier Title VII case of the Sixth Circuit when categorizing front pay as a damages remedy, 130 F.3d at 1204 (citing *Suggs* v. *ServiceMaster Educ. Food Mgmt.*, 72 F.3d 1228 (6th Cir. 1996)), Sixth Circuit precedent was clear, before *Hudson*, that front pay is an equitable remedy in Title VII cases. See *Thurman* v. *Yellow Freight Sys., Inc.*, 97 F.3d 833, 835 (6th Cir. 1996).

The short answer to *Hudson*'s reasoning is that Congress did not impose a cap on all remedies that can be deemed "legal" rather than "equitable." Congress instead excluded from the cap all pre-existing remedies available under Title VII, however classified. Section 1981a(b)(2) expressly states that "[c]ompensatory damages awarded under [Section 1981a] shall not include * * * any * * * type of relief authorized under [Section 2000e-5(g)]." Because front pay was (and is) an established form of equitable relief under Section 2000e-5(g), Section 1981a(b)(2) excludes it from the category of "compensatory damages" that may be awarded, subject to the cap, under Section 1981a.

The *Hudson* panel also suggested that if "compensatory damages awarded * * * for future pecuniary losses," as used in Section 1981a(b)(3), did not include front pay, the phrase "future pecuniary losses" would be meaningless because "front pay has always been the heart of 'future pecuniary losses' in discrimination suits." 130 F.3d at 1204. But as the Seventh Circuit recently noted, "future pecuniary losses" can include, for example, future medical expenses such as mental health treatments. *Pals* v. *Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 500 (2000). "Future pecuniary losses" compensable under Section 1981a also may include expenses associated with taking a new job (such as job-search and moving expenses) and pecuniary losses associated with reputational harm the plaintiff suffered as a result of discrimination. EEOC Compl. Man. (CCH) § 603, ¶ 2062, at 2070 (1998); *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 953 (7th Cir. 1998); see also *Burke*, 504 U.S. at 239 (noting that before 1991, Title VII did not "purport[] to recompense a Title VII plaintiff for * * * harm to reputation, or other consequential damages (*e.g.*, a ruined credit

rating).").[16] Section 1981a thus makes perfect sense when construed as leaving the front pay remedy unaffected.

C. The Legislative History of the 1991 Act And EEOC Guidance Further Support The Conclusion That Front Pay Awards Are Not Subject To The Damages Cap

1. Applying the damages cap to limit front pay would be inconsistent with "Congress' desire to afford victims of discrimination more complete redress for violations of [Title VII]" than Section 2000e-5(g) allows. *Landgraf*, 511 U.S. at 282. When the front pay necessary to make a successful plaintiff whole exceeds the damages cap—which can be as low as $50,000, see 42 U.S.C. 1981a(b)(3)—applying the cap to front pay could well leave the victim *worse off* under the 1991 Act than under prior law: front pay would be reduced below the level that provides equitable relief, and Section 1981a would bar punitive damages and most compensatory damages.[17] Excluding front pay from the scope of compensatory damages thus is critical to ensuring that the 1991 Act in fact provides "additional remedies" to "deter unlawful harassment and intentional discrimination in the workplace." 1991 Act, § 2, 105 Stat. 1071 (*reprinted in* 42 U.S.C. 1981 note).

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[16] The facts of this case illustrate the point. Petitioner testified that, as a result of harassment while working for respondent, she suffered from "nightmares, fear of crowds, nausea, anxiety, and sleeplessness." App., *infra*, 24a. Petitioner was diagnosed as having post-traumatic stress disorder. *Ibid.* Future expenses associated with treating those conditions properly would be recovered as compensatory damages for future pecuniary losses, subject to the statutory cap.

[17] It is theoretically possible, but far from certain, that newly available but uncapped compensatory damages could make up the difference. See p. 12 & n.7, *supra*.

Committee reports on the 1991 bill note that, whereas victims of intentional employment discrimination based on race could recover compensatory damages under 42 U.S.C. 1981, victims of intentional employment discrimination based on gender or religion could not recover for out-of-pocket expenses, such as medical bills, resulting from illegal harassment. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 64-65 (1991) (House Education and Labor Comm.); *id.* Pt. 2, at 24-25 (House Judiciary Comm.). The committees found "a compelling need" for damages remedies "in addition to the equitable remedies" that already were available, in order to make victims of gender or religious discrimination whole, to provide appropriate deterrence, and to encourage private enforcement of Title VII. *Id.* Pt. 1, at 70; *id.* Pt. 2, at 28, 29. There is no indication that when legislators endorsed additional remedies to benefit victims of discrimination, deter violations of Title VII, and improve enforcement, they intended to *reduce* equitable awards that would otherwise be available under Section 2000e-5(g). To the contrary, the House Judiciary Committee indicated that equitable remedies were "not affected" by the availability of damages. *Id.* Pt. 2, at 29; see also *West* v. *Gibson*, 527 U.S. 212, 219-220 (1999) (noting legislators' stated intent to create a new remedy in order to help make victims whole).

Legislators, moreover, clearly indicated that front pay should be deemed a form of pre-existing equitable relief exempt from the damages cap. As initially passed by the House, the 1991 amendments provided that compensatory damages would not include "backpay or any interest thereon." H.R. Rep. No. 40, *supra*, Pt. 1, at 12 (proposed Section 206 of 1991 Act); see *id.* Pt. 1, at 74

n.71; *id.* Pt. 2, at 29.[18] The Senate added the further proviso that compensatory damages would not include "any other type of relief authorized under" Section 2000e-5(g). 137 Cong. Rec. 28,663-28,664, 29,066-29,067 (1991) (introduction and passage of Danforth/Kennedy Amendment). Senator Kennedy, the lead co-sponsor of the Senate amendment, explained that, under the Senate amendment, front pay would be treated as equitable relief rather than compensatory damages. *Id.* at 28,637 ("Compensatory damages do not include backpay, interest on backpay, or any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964, *including front pay*.") (emphasis added).[19] Interpretive memoranda placed in the record of the congressional debates likewise state that front pay would not be treated as compensatory damages under the 1991 Act. *Id.* at 29,046 (Senate sponsors' memorandum); *id.* at 30,661 (interpretive memorandum of Rep. Edwards, noting that "Damages awarded under section

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[18] As passed by the House before Senate consideration, the 1991 Act capped punitive damages, but not compensatory damages. See 137 Cong. Rec. 13,515, 13,516, 13,552-13,553 (1991) (introduction and passage of Brooks substitute containing punitive damages cap). In the House bill, the exclusion of back pay and interest from the scope of compensatory damages served solely to prevent plaintiffs from recovering duplicative back pay and compensatory damages for the same injury. See H.R. Rep. No. 40, *supra*, Pt. 1, at 74 n.71; *id.* Pt. 2, at 29. When the Senate applied the damages cap to compensatory damages, the provision distinguishing compensatory damages from existing remedies served to define the scope of the damages cap as well.

[19] Legislators who participated in debates on the 1991 Act admittedly made some "frankly partisan" statements about certain hotly-contested aspects of the law. *Landgraf*, 511 U.S. at 262. There was no disagreement, however, about the continued availability of front pay, over and above the new damages remedies.

[1981a] cannot include remedies already available under Title VII, including back pay, the interest thereon, *front pay*, or any other relief authorized under Title VII.") (emphasis added).

2. Citing the legislative history discussed above as well as the language of Section 1981a(b)(2), the EEOC determined in 1992 that front pay is an equitable remedy under Section 2000e-5(g), and is not subject to the cap on compensatory and punitive damages. EEOC, *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991*, at 13 n.9 & accompanying text (effective July 14, 1992). That contemporaneous interpretation, developed and consistently applied by the agency with primary responsibility for enforcing Title VII, "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976)). Accordingly, the EEOC's guidance provides additional grounds for holding that front pay is not subject to the cap on compensatory and punitive damages in an action under Title VII.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2001

APPENDIX A

UNITED STATES DISTRICT COURT
W.D. TENNESSEE, WESTERN DIVISION

No. 95-3010 M1/V

SHARON B. POLLARD, PLAINTIFF

v.

E.I. DUPONT DE NEMOURS, INC., DEFENDANT

Aug. 20, 1998

MEMORANDUM OPINION AND ORDER

MCCALLA, District Judge.

Plaintiff, Sharon Pollard, brought this suit against her former employer, alleging that she had been subjected to a hostile work environment because of her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). A non-jury trial was held in this matter on October 14, 15, 16, and 24, and November 3 and 4 of 1997. For the reasons set forth below, the Court finds that plaintiff was subjected to a hostile work environment because of her gender, in violation of Title VII, and judgment is ENTERED in favor of plaintiff.

FINDINGS OF FACT

Plaintiff began her employment with defendant in 1977 as a utility worker in the utility pool. She was promoted to the position of assistant operator ("AO") in the oxone flouride area in 1978, and transferred to an AO position in the hydrogen peroxide area in 1979. In 1987, plaintiff was promoted to the position of operator in the hydrogen peroxide area. While plaintiff was working as an operator in peroxide, only one other woman was in an operator position in that area, and only two of the assistant operators were female. All of the other operators and assistant operators in the peroxide area were male.[1]

Plaintiff initially worked as an operator on "C" shift from 1987 to 1992. Each shift has three operators: the control room operator (or operator # 1), operator # 2, and operator # 3. Each operator has separate duties on the shift, and none of the operators is superior in rank to the others. The control room operator works in the control room, the # 2 operator works the south side of the area, and the # 3 operator works in the laboratory and in the water building. The three AOs that are assigned to each shift take direction from the operators. While plaintiff was working as the control room operator on "C" shift, an incident occurred during which an AO, Rory Bricco, refused to take direction from plaintiff. Mr. Bricco informed plaintiff that he

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[1] Based on testimony at trial, the Court concludes that there are four different shifts ("A", "B", "C", and "D"), with approximately seven people on each shift. *See* Testimony of Mark Cobb ("Cobb's Test."), Trial Transcript ("Tr.") at 240. Accordingly, of the approximately twenty-eight employees on shifts in the peroxide area, only four were women.

could not take direction from a woman, and placed a Bible on her desk, opened to a passage which read, "I do not permit a woman to teach or have authority over a man. She must be silent."[2] Plaintiff subsequently transferred to a # 2 operator position on "A" shift in 1992.

In 1994, plaintiff had moved from the # 2 operator position to the # 3 operator position on "A" shift in the peroxide area. The other members of her shift were Steve Carney, Jerry Lee, Joey Moody, David Walker, and Mark Cobb. Carney was the control room operator, Lee was the # 2 operator, and Cobb, Moody, and Walker were the three AOs on the shift. The shift supervisor at that time was David Swartz.

During 1992 and 1993, plaintiff and all of the other members of "A" shift got along well. Many of the witnesses testified that they viewed the shift as their "extended family." Members of the shift would cook and eat their meals together in the break room,[3]

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[2] The Court notes that this event occurred outside of the relevant time period in this case, which is from December 1994 to December 1995, and thus cannot form a basis for liability on the part of defendant. Because allegations involving this same Bible verse are properly before the Court, however, this event is included as context, as the Court finds that the fact that plaintiff had been previously exposed to this Bible verse while working in the peroxide area contributed to the intensity of her reaction when she saw it for the second time.

[3] There were three separate eight hour shifts in the peroxide area: the 8:00 a.m. to 4:00 p.m. shift, the 4:00 p.m. to 12:00 midnight shift, and the 12:00 midnight to 8:00 a.m. shift. The employee break room included a small kitchen area with a stove, refrigerator, and microwave, and, particularly on the evening and midnight

and would talk to each other regularly about their lives outside of work.

In February of 1994, however, the congenial atmosphere on "A" shift began to change. At that time, DuPont announced that it would be taking part, for the first time, in the nationally recognized "Take Your Daughters to Work Day" ("TYDTWD") in April of that year. Plaintiff, as one of two female operators in the entire peroxide area, was asked to give a talk about her job to some of the girls coming to visit the plant on that day, and she agreed to do so. A number of the men on "A" shift, particularly Steve Carney and Jerry Lee, were against TYDTWD, and made their displeasure with DuPont's decision to take part in this event widely known. A number of other men in peroxide, and throughout the plant, were against DuPont's participation as well. *See* Testimony of Jerry Lee ("Lee's Test."), Tr. at 495. One of these men, Paul Lucas, sent an email out to everyone in the plant regarding TYDTWD, referring to the event as "horse malarky."

Plaintiff had discussions with both Steve Carney and Jerry Lee regarding her participation in TYDTWD, and both men made clear that they were against it. Testimony of Sharon Pollard ("Pollard's Test."), Tr. at 627-28. Subsequent to those discussions, the atmosphere on the shift began to change. All of the men on the shift, with the exception of Mark Cobb, stopped eating with plaintiff and stopped talking to her. Cobb testified that Carney instructed the other men on the shift not to eat with plaintiff, not to share food with her, not to be in the break room with her, and not to talk to

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shifts, members of "A" shift would divide up cooking duties and take turns bringing in food to allow them to eat together.

her. Cobb's Test. at 251, 273. Plaintiff testified as follows:

> [I]f I came into the lunchroom, nobody would sit down at the table with me. If I sat down at a table that someone was already sitting at, they would get up and leave. . . . I heard a lot of under your breath kind of things . . . and snickering.

Pollard's Test., Tr. at 37. Cobb further stated that Carney instructed the other men on "A" shift not to follow any of plaintiff's instructions without checking with him first. Cobb's Test., Tr. at 251-52. Carney himself conceded that "[i]t's a possibility" that he told AOs on "A" shift to disregard plaintiff's instructions. *Id.* at 904.

It was common knowledge among the employees in the peroxide area that Steve Carney, Jerry Lee, Rory Bricco, and many of the other men in the area, did not approve of women working in peroxide. Cobb's Test., Tr. at 246-47, 251, 359, 361; Testimony of David Walker ("Walker's Test."), Tr. at 746-47. Mark Cobb testified that Carney would make comments to this effect approximately five times per week to the men on "A" shift, and Cobb and several other witnesses confirmed that Carney routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52.

Several witnesses testified that they had heard Carney use the word "heifer" to refer to women, and that use of the term "heifer" to refer to women in general was commonplace in the peroxide area. Testimony of Joey Moody ("Moody's Test."), Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723. Carney

admitted that he referred to women as "heifers," and that he referred to plaintiff as a "bitch" and a "split tail." Testimony of Steve Carney ("Carney's Test."), Tr. at 908-09. In addition, DuPont had a company-sponsored support group known as the Women's Network,[4] of which Carney routinely expressed his disapproval. Cobb's Test., Tr. at 246-47; *see also* Testimony of Kay Jenks ("Jenks' Test."), Tr. at 416 (noting that the men on plaintiff's shift did not approve of plaintiff attending the meetings of the Women's Network).

In May of 1994, after plaintiff had been experiencing the kind of isolation described above from the members of "A" shift for approximately two months, the shift supervisor, David Swartz, held a training meeting.[5] During the meeting, all of the members of "A" shift and Swartz were seated around a small conference table. At some point during a break in the meeting, Carney and Walker were having a discussion about a girls softball team, during which Carney said "that heifer can't coach," in reference to the woman who coached the team. Moody's Test., Tr. at 697. Carney also said something along the lines of "women have no business coaching." Moody's Test., Tr. at 677-78; Walker's Test., Tr. at 753; Lee's Test ., Tr. at 472-73; Pollard's Test., Tr. at 632. Plaintiff, who was sitting across the table from Carney, heard these comments, became very upset, and asked to be excused to go to the nurse's station. Pollard's Test., Tr. at 632-34.

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[4] Plaintiff regularly attended meetings of the Women's Network.

[5] This training meeting was not held to address the problems on the shift, rather it was a training session on work-related matters that was regularly held on Tuesdays.

Once she arrived at the nurse's station, plaintiff asked the nurse to call her supervisor, David Swartz, to come and speak with her. When Swartz arrived, plaintiff was very upset and began to cry. Swartz testified that she told him "that she couldn't take it any more, she was tired of people talking about women the way they do . . . [that Steve Carney had said] 'Well, that heifer can't coach,' . . . and she was just tired of them saying that women can't do anything." Testimony of David Swartz ("Swartz's Test."), Tr. at 949-50. Swartz further testified that he understood plaintiff's words to mean that "she couldn't take it any more about [the] men [in peroxide] degrading women." *Id.* at 979-80.

Swartz testified that he spoke with his supervisor, Alan Hubbell, about this incident, and that they decided that Swartz should speak to the men on the shift individually. Swartz's Test., Tr. at 952. With the exception of Walker, however, none of the men on the shift remembered Swartz speaking to them about this incident. Carney testified that Swartz spoke to him "a few times" about not communicating with plaintiff "right after [they] quit talking," but that Swartz soon gave up on trying to talk to him about it "because he knows I'm hardheaded . . . [and there] wasn't no sense [sic] in saying anything else." Carney's Test., Tr. at 883-84.

Swartz testified that he could tell "there was tension on the shift" beginning in the spring of 1994, and that things did not improve during the rest of the year. Swartz's Test., Tr. at 954-55. He testified that many of the men talked to him about the tension on the shift, and that plaintiff complained to him about the lack of

communication and isolation on several occasions. *Id.* at 954, 956. When asked by counsel for DuPont what he, as the shift supervisor, tried to do to address the situation between spring of 1994 and December of 1994, Swartz responded:

> Well, I mean we continually talked to each individual. . . . I worked personally talking to each one of them hopefully [sic] that we could get back together, you know, as a more friendly group where it would relieve the tension, but it didn't seem to work.

Id. at 955.

During the spring and summer of 1994, plaintiff's situation worsened. The men on the shift still refused to eat with her or speak with her. She testified, and Mark Cobb corroborated, that on several occasions Carney would set off false alarms in her area, causing her to run around the peroxide area in search of a non-existent problem.[6] Pollard's Test., Tr. at 38; Cobb's Test., Tr. at 266-69. Cobb testified that Carney would brag to the other men on "A" shift about making plaintiff run all over plant to "show[] that he's in control." Cobb's Test., Tr. at 269. Cobb further testified that on two separate occasions after a false alarm had been pulled while plaintiff was cooking her dinner, one of the men would turn up the stove under her food, burning her dinner and rendering it inedible. *Id.* at 270-71. Cobb also stated that on several occasions, Carney would not call out actual alarms from plaintiff's area.[7]

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[6] Several witnesses testified that the peroxide area was the size of three city blocks.

[7] Based on the testimony during the trial, it appears that the control room operator sits in the control room of the peroxide area

Id. at 275. As a result, plaintiff would not respond to the problem, and it would appear to the # 3 operator on the next shift that she was not doing her job. *Id.* at 275.

Part of plaintiff's job as the # 3 operator was to monitor the vaporizers in the peroxide tanks, determine when they should be moved, and instruct the AOs to move them according to this schedule. Pollard's Test., Tr. at 32-33; Moody's Test., Tr. at 687. Plaintiff testified that, on several occasions, Carney told one of the AOs on "A" shift to remove the vaporizer from the tank earlier than plaintiff had planned for it to be removed, and then instructed them not to tell her that they had done so. Pollard's Test., Tr. at 32-33, 35. Plaintiff needed to sample the peroxide one hour after the vaporizer was removed. *Id.* at 90; Moody's Test. at 710. Accordingly, if the vaporizer was removed early, and plaintiff was not informed that it was removed, the resulting product could be too weak.[8] The fact that the peroxide was not timely sampled also created more work for the # 3 operator on the next shift, and made it appear that plaintiff was not doing her job. *Id.* at 94-95. In addition, removing the vaporizer early could mean that not enough peroxide was made for the

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and monitors a series of instrument panels. If there is a problem, the control room operator will become aware of it via these instruments. The control room operator is then supposed to call out an alarm over the intercom system to the operator or AO working in the relevant area, so that the appropriate individual can go check on the problem.

[8] Various percentage strengths of peroxide were made at DuPont. Plaintiff testified that if a tank was off even 2%, e.g., a tank that was supposed to be 70% strength was 68% instead, it could not be brought back up to the proper percentage because the volume of chemicals that would have to be added would not fit into the already full tank. Pollard's Test., Tr. at 102-03.

shipment out to DuPont's customers the next day, again making it appear as if plaintiff was not competently executing her job duties. *Id.* 89-90.

Plaintiff testified that the vaporizers were removed early approximately seven times during 1994 and 1995, with the most recent incident occurring during the week of July 5-11, 1995. After the first time that the problems with the vaporizers occurred, plaintiff spoke with David Walker and Joey Moody about it and asked them not to do it again. *Id.* at 98. Moody told her that he was following Carney's instructions. *Id.* Carney himself testified that he would sometimes tell one of the AOs to move a vaporizer, and that when he did so he did not believe that he had an obligation to tell plaintiff. Carney's Test., Tr. at 895.

Plaintiff testified that she spoke to her supervisor, David Swartz, about the vaporizer problem the second time it occurred, and every time after that. Swartz admitted that he spoke with plaintiff on several occasions during the spring and summer of 1994, and that she complained to him that "she wasn't getting communication—that Steve wasn't calling out alarms or he wouldn't say stuff to her when [vaporizers] were pulled or whatever because she had responsibility [for] sampling those tanks." Swartz's Test., Tr. at 957. Swartz testified that his only response to these complaints was the following:

> I [Swartz] would go to Steve and say "Steve, that's part of your job, you got to call out alarms." His response was, "I'm calling out the alarms, she's not answering it." So I was hearing it from both sides. And I would tell Sharon, "Steve's saying you're not responding to it." And she would say that she was,

> and so we had to get that communication link straightened out, and I thought that eventually that worked out. . . .

Id. 957. The evidence in the record, however, demonstrates that the problem was *not* solved, and that Swartz never investigated plaintiff's complaints further.

During the summer of 1994, plaintiff came to work one day and found that both of the tires on her bicycle had been slit open.[9] Swartz admitted that the day that plaintiff discovered that the tires had been cut, she reported it to him and told him that she suspected that Carney was responsible. Swartz's Test., Tr. at 959. In response to this complaint, Swartz spoke with Carney, and Carney denied cutting plaintiff's tires. *Id.* Again, after Carney denied the allegations, Swartz did nothing else to investigate plaintiff's complaints. Swartz stated, "I didn't have any other facts to go on that would say that he did it." *Id.* 959-60. Accordingly, rather than investigate further, Swartz did nothing.

In December of 1994, after these problems had been occurring for ten months with no improvement, Mark Cobb and David Walker approached David Swartz and asked him to call a meeting with the entire shift to discuss the situation.[10] Accordingly, a meeting was held in late December of 1994 that came to be known as the "first healing meeting." On the date that the

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[9] Because the DuPont plant is so large, employees often ride bicycles from the front gate to their area.

[10] The Court notes that even after all of the complaints that Swartz had received during the past ten months from plaintiff, the idea to call a meeting to discuss the situation was not his.

meeting was to be held, Carney was on vacation. The members of the shift discussed whether or not they should proceed with the meeting without him, and decided to go ahead.

At this meeting, Walker and Moody told plaintiff that Carney had encouraged them not to talk to her. Pollard's Test., Tr. at 46. Walker and Moody also told plaintiff that Carney had told them that she was "keeping a book on them" in which she wrote down everything they said to use it against them. *Id.* Plaintiff assured them that she was not keeping a book, and then explained to them how stressful the isolation was for her, and how she "had to run around and do more steps than [she] would normally do to get [her] job done . . . because [she] wasn't getting communicated with." *Id.* at 47. Plaintiff also explained to them that the lack of communication was dangerous because a spill or explosion could result, and that it could also cause a shipment to a customer to be missed. *Id.* at 51. David Swartz was present throughout this meeting and, again, heard all of plaintiff's complaints.

When Carney returned from vacation and learned that "A" shift had held a meeting without him he was furious, and demanded that another meeting be held. Pollard's Test., Tr. at 51; Cobb's Test., Tr. 285-86; Moody's Test., Tr. at 684; Swartz's Test., Tr. at 961. During the second meeting, the entire shift, including Swartz, was present. Plaintiff reiterated all of her concerns about the lack of communication and other problems. Plaintiff also mentioned that her bike tires had been slashed, and another incident that summer in which she believed that Carney had tried to run her off

the road in his truck as she left the DuPont plant.[11] Moody's Test., Tr. at 685; Walker's Test., Tr. at 738. At the second meeting, Carney "got in [plaintiff's] face" and said "Nobody in this area likes you, you're here all alone, it's all your own fault." Pollard's Test., Tr. at 52; Moody's Test., Tr. at 684-85; Cobb's Test., Tr. at 289-90. Plaintiff then turned to Swartz, who was observing this interaction, and asked him if he was going to permit Carney to speak to her in that manner. Cobb's Test., Tr. at 290-91; Pollard's Test., Tr. at 52; Swartz's Test., Tr. at 993. Swartz then said "I think that's enough," and the meeting ended with no further resolution of the issues. *Id.*

Subsequent to these meetings, the situation did not improve. Swartz was aware that the hostility and tension on the shift had not abated, and plaintiff continued to complain to him that the environment was intolerable for her. Swartz's Test. at 964. Swartz, however, took no action to help her. During this time period, plaintiff attended several meetings of the Women's Network and spoke to the group about the problems she was facing, the isolation she was experiencing, and the psychological effect it was having on her. Jenks' Test., Tr. at 415-17. Kay Jenks, a female engineer and one of the leaders of the Woman's Network, testified that during the Network meetings plaintiff:

> was concerned that she would be out there on nights, frequently the only woman on shift, she would go for hours without even hearing another

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[11] Swartz concedes that he never did anything to investigate plaintiff's allegation that Carney tried to run her off the road. Swartz's Test., Tr. at 1004.

> voice. . . . She was concerned that something would happen that would endanger her and they would not tell her, they would not get ahold of her, she was also concerned that maybe something would go wrong in the process that she could help fix or impact, but they wouldn't let her know in time and then it would reflect poorly on her performance.

Id. at 417.

In attendance at some of these meetings was Beth Basham, unit supervisor for the peroxide area.[12] Basham conceded that she heard plaintiff talk about the problems she was having with the men in peroxide on several occasions. Basham's Test., Tr. at 1184, 1194-95. Basham further testified that she "knew there was a real problem in the peroxide area of the male workers accepting the role of a female in that area," and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." *Id.* at 1195, 1217. In spite of this knowledge, however, Basham never investigated the situation based on what she had learned at the Women's Network meetings.[13] Basham testified that she never wrote a report or sent a memorandum to anyone in upper management at DuPont stating that there was a real problem in the peroxide

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[12] Basham was the supervisor of Alan Hubbell, who was David Swartz's supervisor. Basham was the "number one person in the peroxide area," and reported directly to the plant manager, Gary Lewis. Testimony of Beth Basham ("Basham's Test."), Tr. at 1181-82.

[13] Basham did become involved in the investigation that took place during the summer of 1995, but, prior to that, did nothing to formally investigate plaintiff's charges of harassment, despite learning of them in the context of the Women's Network meetings.

area regarding the treatment of female employees, and she "could not recall" if she ever discussed the situation with anyone at DuPont's headquarters informally. *Id.* at 1197-98.

On May 25, 1995, the Women's Network hosted a meeting at which Bernie Scales, a specialist in diversity training from DuPont's headquarters, spoke to the Network. At that meeting, plaintiff began to talk about the isolation and harassment she was receiving from the men in peroxide, and asked to speak to Scales further at the conclusion of the meeting. After the meeting was over, Scales met with plaintiff. At that meeting plaintiff told Scales all about the long-term harassment and isolation she had been experiencing. As a result of that meeting, Scales spoke to the plant manager Gary Lewis, who then spoke to Bob Shaw, employee relations manager for the Memphis DuPont plant. On May 28, 1995, Shaw, Lee Ann Rice,[14] and Gary Fish[15] met with plaintiff to discuss her situation. During the course of that meeting, plaintiff recounted the full history of the harassment she had experienced in the peroxide area, including the allegation that Carney had tried to run her off the road the previous summer, and told them that she wanted this situation corrected. Testimony of Bob Shaw ("Shaw's Test."), Tr. at 1094; Testimony of Lee Ann Rice ("Rice's Test."), Tr. at 401; Pollard's Test., Tr. at 62. Subsequent to that meeting, Shaw and Swartz spoke to Carney about his behavior. Swartz's Test., Tr. at 968. Carney never received a formal written reprimand, was never sus-

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[14] Rice is a manager in Human Resources. Her supervisor is Bob Shaw.

[15] Fish was a plant shift supervisor.

pended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04. In addition, neither Shaw, nor anyone else at Dupont, ever investigated plaintiff's allegation that Carney had tried to run her off the road, after Shaw spoke to Carney and Carney denied that it had occurred. Shaw's Test., Tr. at 1102. Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations. Basham's Test., Tr. at 1250-51.

After Shaw spoke to Carney, Carney's behavior improved for about four weeks. During the week of July 5-11, 1995, however, Carney returned to his prior patterns of behavior. Pollard's Test., Tr. at 107. Another incident in which the vaporizer was taken out early without plaintiff's knowledge also occurred during this week. *Id.* at 89. Plaintiff went to David Swartz and begged him to "just get me off this shift, nothing's changed and I can't take it." *Id.* at 107. Rather than investigating the situation or moving Carney to another shift, Swartz spoke to plaintiff the next day and informed her that a control room operator position on another shift was available. *Id.* at 108; Swartz's Test., Tr. at 994-96. Plaintiff did not want to take this position because it was on the same shift with Rory Bricco, the man who had refused to take direction from her when she was a control room operator on "C" shift. Plaintiff told Swartz she would not bid for that position. Pollard's Test., Tr. at 108-09.

On July 28, 1995, plaintiff discovered a highlighted copy of the same Bible verse that Bricco had put on her

desk when he refused to take direction from her in her mailbox at work. As noted above, that Bible verse read: "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." Tr. at 407 (quoting 1 *Timothy* 2:11). When plaintiff discovered the Bible verse, she described her reaction as follows:

> I felt like I had been hit with a brick, I just couldn't believe that after all that had been talked about, they were asking me to go back into the control room . . . and I just considered [that] this was the men's answer to that.

Pollard's Test., Tr. at 110.

Subsequent to that event, plaintiff never returned to work at DuPont. A committee was formed to investigate the Bible verse incident. As with the other "investigations" that DuPont had initiated with regard to plaintiff's complaints, this one was wretchedly inadequate. The investigation consisted of asking an identical series of typed questions to each of the men on "A" shift individually, and to the other men in the peroxide area in groups. Shaw's Test., Tr. at 1106. All of the questions were answerable with a simple yes or no, and when all of the men denied having any knowledge of the incident, DuPont proceeded no further with the investigation. Shaw's Test., Tr. at 1268, 1270. No one from DuPont management ever questioned Steve Carney about whether he was involved in the Bible verse incident. Carney's Test., Tr. at 931.

After plaintiff left "A" shift, a party was held to celebrate her departure. Cobb's Test., Tr. at 277-79; Carney's Test., Tr. at 931-32. Steve Carney fried cat-

fish and crappie that he had brought in, and the other men blew up balloons and taped them to the ceiling. *Id.* Mark Cobb testified that at the party Carney declared, "glad the bitch is gone, glad the bitch is not coming back." Cobb's Test., Tr. at 278. Carney himself testified as follows:

> Q: Now, after she [plaintiff] left, there was a party in the peroxide are [*sic*], wasn't there?
>
> A: Yes, ma'am.
>
> Q: And you participated in that party, correct?
>
> A: Yes, ma'am.
>
> Q: And there were balloons at that party, correct?
>
> A: Yes, ma'am.
>
> Q: And I believe there was crappie cooked, correct?
>
> A: Yes, ma'am.
>
> Q: And you do recall that, don't you?
>
> A: Yes, ma'am.
>
> Q: You were celebrating the departure of Sharon Pollard, weren't you?
>
> A: Yes, ma'am.

Carney's Test., Tr. at 931-32.

Plaintiff was on short-term disability leave for the next six months, during which time she saw a number of psychologists and psychiatrists that DuPont required

her to visit. In particular, DuPont sent plaintiff to Dr. Fred Steinberg, who concluded she could not return to work. In spite of this opinion, however, DuPont scheduled a "return to work" meeting with plaintiff in February of 1996. At that meeting DuPont management would not guarantee that plaintiff would not be put back on a shift with Carney. Pollard's Test., Tr. at 219. Plaintiff told them that she could not return to work under those conditions, and DuPont terminated her, effective February 29, 1996. *Id.* at 154, 217-19.

CONCLUSIONS OF LAW

Title VII prohibits discrimination "against any individual with respect to [her] compensation, conditions, or privileges of employment, because of such individual's. . . sex." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment. As noted by the Sixth Circuit in *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 825 (6th Cir. 1997), the statute grants employees "the right to be work in an environment free from discriminatory intimidation, ridicule, and insult." 104 F.3d at 825 (quoting *Meritor*, 477 U.S. at 65, 106 S. Ct. 2399).

In order to succeed on a hostile work environment claim, a plaintiff must prove the following elements: 1) the plaintiff is a member of a protected class; 2) the plaintiff was subject to unwelcomed sexual harassment; 3) the harassment complained of was based on sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work

performance and creating an intimidating, hostile, or offensive work environment; and 5) the employer knew, or should have known, of the charged sexual harassment, and failed to take prompt and appropriate corrective action. *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49 (6th Cir. 1996).

There is no question that plaintiff satisfies the first two elements as required by *Fleenor*. First, as a woman, plaintiff is a member of a protected class. Second, it is clear from plaintiff's repeated complaints, initially to her supervisor David Swartz and later to other members of DuPont management, including Shaw, Rice, Scales, and Basham, that the harassment plaintiff was experiencing was unwelcome.[16]

With regard to the third element of the *Fleenor* test, the Court concludes that plaintiff has unequivocally established that the harassment she experienced was based on her gender. As recently clarified by the Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998), harassment based on gender need not be sexual in nature:

> [H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination based on sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and deroga-

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[16] Moreover, plaintiff's repeated complaints during the Women's Network meetings, and to the other members of "A" shift during the two "healing" meetings held in December 1994, further support the Court's conclusion that the harassment was unwelcome.

> tory terms . . . *as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.*

Oncale, 523 U.S. at 80, 118 S. Ct. at 1002 (emphasis added).

As noted above, the record is replete with evidence that several of the men in the peroxide area were "motivated by general hostility to women in the workplace," and felt strongly that women did not belong in the peroxide area. Cobb's Test., Tr. at 246-47, 251, 359, 361; Walker's Test., Tr. at 746-47; Basham's Test., Tr. at 1195. Specifically as to plaintiff's shift, Steve Carney stated that women didn't belong there approximately five times per week, and routinely referred to women as "bitches" and "cunts." Cobb's Test., Tr. at 264, 266; Lee's Test., Tr. at 491-92; Walker's Test., Tr. at 751-52. Use of the term "heifer" to refer to women was commonplace behavior by men in the peroxide area. Moody's Test., Tr. at 697; Lee's Test., Tr. at 489-90; Walker's Test., Tr. at 723.

Carney himself testified that he referred to women as "heifers" and that he referred to plaintiff as a "bitch" and a "split tail."[17] Carney's Test., Tr. 908-09. Carney, and the other men on "A" shift, repeatedly voiced their objections to the Women's Network and to DuPont's participation in "Take Your Daughters to Work Day." Even Beth Basham, DuPont's unit supervisor of the peroxide area, conceded that she "was of the firm belief that plaintiff had been harassed on account of her sex in

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[17] The Court notes that several witnesses testified that they considered Carney to be a "leader." Walker's Test., Tr. at 757; Swartz's Test., Tr. at 992.

the peroxide area." Basham's Test., Tr. at 1217. Finally, the content of the Bible verse placed in plaintiff's mailbox on July 28, 1995, leaves absolutely no doubt in the Court's mind that the harassment of plaintiff was based on her gender.

As to the question of whether the harassment was pervasive enough to constitute a hostile work environment and unreasonably interfere with plaintiff's work performance, the Supreme Court reaffirmed the standard set forth in *Meritor*, and further clarified it in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). In *Harris*, the Court explained that the conduct must be judged by both an objective and subjective standard. 510 U.S. at 21-22, 114 S. Ct. 367. Accordingly, "the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." *Black*, 104 F.3d at 826 (citing *Harris*, 510 U.S. at 21-22, 114 S. Ct. 367.) "This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris*, 510 U.S. at 21, 114 S. Ct. 367.

The Supreme Court acknowledged that this approach is not susceptible to a "mathematically precise test," *id.* 510 U.S. at 22, 114 S. Ct. 367, but sought to provide some guidance with regard to the determination of whether a work environment was objectively hostile or abusive. The Court explained that all of the circumstances should be considered, and offered a non-

exhaustive list of relevant factors, including:

> [T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. 510 U.S. at 23, 114 S. Ct. 367.

Based on the evidence set forth above, the Court concludes that harassment faced by plaintiff while she was on the "A" shift at DuPont, and specifically during the December 1994 through December 1995 period relevant to liability in this case, constituted a pervasively hostile environment and unreasonably interfered with her work performance. The false alarms, failure to communicate alarms and other information necessary for plaintiff's job, and the early removal of the vaporizers at Carney's instruction on several occasions, are examples of direct interference with plaintiff's execution of her job duties. This kind of deliberate tampering with plaintiff's area of responsibility could have, and very well may have, resulted in safety risks or production shortages, and made plaintiff appear incompetent to the # 3 operator on the next shift.

Moreover, as Justice Ginsburg noted in her concurring opinion in *Harris*, to show unreasonable inter-

ference with a plaintiff's work performance, "'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" 510 U.S. 17, 25, 114 S. Ct. 367, 126 L.Ed.2d 295 (Ginsburg, J., concurring) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988)). The Court finds that plaintiff has demonstrated that the harassment so altered her working conditions as to make it more difficult to do her job, on both an objective and subjective level.

Plaintiff testified that she suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness. A psychologist and a psychiatrist who saw plaintiff both concluded that she suffered from post-traumatic stress disorder. *See* Testimony of Dr. Janet Hill, Tr. 775-851; Testimony of Dr. Richard Farmer, Tr. 502-79. Several witnesses testified about the dramatic change in plaintiff's personality during this time period. Jenks' Test., Tr. at 418; Testimony of Charlotte Blaylock, Tr. at 442-44; Testimony of John Pollard, Tr. at 451-52.

Plaintiff testified extensively about the enormous psychological effect the long-term campaign of harassment, intimidation, and isolation executed by the men on "A" shift had on her mental and emotional state. Plaintiff stated that the last straw in the long ordeal, the placing of the Bible verse in her mailbox at work, so upset her and interfered with her ability to perform her job that she left her position at the plant where she had worked for the past seventeen years and did not return.

Accordingly, the Court concludes that plaintiff has satisfied the fourth requirement necessary for a hostile environment claim, in that she has demonstrated that the harassment "unreasonably interfer[ed] with [her] work performance and creat[ed] an intimidating, hostile, [and] offensive working environment." *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 49 (6th Cir. 1996).

Finally, the Court must consider whether DuPont knew, or should have known, of the charged sexual harassment and failed to take prompt and appropriate corrective action. The evidence on this point is overwhelming. As set forth above, beginning in the spring of 1994, plaintiff complained about the lack of communication, constant disparaging remarks about women, and the sabotage of her work by the men on her shift to her supervisor, David Swartz.

Time and time again, after receiving these complaints from plaintiff,[18] Swartz either made a half-hearted attempt to speak to Carney, which ended as soon as Carney denied the conduct, or did nothing at all. Carney testified that after a few attempts, Swartz quit talking to him because he was "hard-headed" and Swartz knew "there wasn't no sense [sic] in saying

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[18] The Court notes that the testimony of both plaintiff and Swartz reveals that plaintiff discussed her situation with Swartz throughout the latter half of 1994 and in 1995. As to specific instances, however, the record reveals that Swartz was on notice of plaintiff's complaints in May of 1994 after Carney's comment that "women had no business coaching" at the training meeting, during the summer of 1994 when plaintiff complained to Swartz the day after her bicycle tires were cut, and in December 1994 when Swartz was present at the two "healing meetings" at which plaintiff set forth all of her complaints and concerns. Swartz's Test., Tr. at 949-50, 979-80, 958, 959-60, 993.

anything else." Carney's Test., Tr. at 883-84. Swartz himself conceded that his efforts to remedy the situation "didn't seem to work." Swartz's Test., Tr. at 955. However, Swartz took no further steps to end the campaign of harassment being waged against plaintiff by the men on "A" shift.

Swartz testified that, at least after the softball coach incident in May of 1994, he spoke to his supervisor Alan Hubbell about the situation in peroxide. Swartz's Test., Tr. at 952. In spite of the fact that the situation did not improve, Hubbell never followed-up on the situation or initiated any kind of formal investigation. Beth Basham, the highest-ranked supervisor in the peroxide area, testified that she was on notice of the harassment plaintiff was experiencing based on her attendance at Women's Network meeting at which plaintiff spoke about her situation. Basham, Tr. at 1184, 1194-95. Just as with Swartz, however, Basham did nothing to investigate the situation or discipline the individuals involved. After Bob Shaw, employee relations manager for the Memphis plant, became aware that this harassment had been ongoing since 1994, Shaw spoke to Carney about it, but never formally disciplined him in any way. Bernie Scales, from DuPont headquarters, was aware of the situation based on plaintiff's meeting with him on May 25, 1995. However, no one from DuPont's headquarters ever visited the Memphis plant to follow-up on plaintiff's situation or conduct an investigation of her allegations.

Several witnesses testified that DuPont has a progressive disciplinary system in which employees are to receive increasingly severe sanctions if the misconduct at issue does not cease. Sanctions in this system range

from an informal oral reprimand to termination. In spite of all of the complaints plaintiff made against him, and the fact that the situation did not improve, Steve Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated. Basham's Test., Tr. at 1223; Carney's Test., Tr. at 903-04.

This situation was reprehensible. This is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched. Plaintiff repeatedly complained to DuPont management to no avail. Accordingly, the Court concludes, without reservation, that DuPont knew of the charged sexual harassment and utterly failed to take prompt and appropriate corrective action.

Plaintiff has, therefore, satisfied each of the elements necessary to prove that she was subjected to a hostile work environment based on her gender in violation of Title VII, and judgment is ENTERED in favor of plaintiff as follows:

1. Defendant is ORDERED to pay plaintiff $107,364.00 in back pay and accrued benefits;

2. Defendant is ORDERED to pay plaintiff $300,000.00 in compensatory damages,[19] in

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[19] The amount of compensatory damages includes front pay, pursuant to the Sixth Circuit's holding in *Hudson v. Reno*, 130 F.3d 1193, 1204 (6th Cir. 1997) ("[W]e conclude that front pay is subject to the caps on future pecuniary losses as provided in § 1981a(b)(3) because front pay is a 'future pecuniary loss.'"). The Court notes that the $300,000.00 award is, in fact, insufficient to

accordance with the statutory cap set forth in 42 U.S.C. § 1981a(b)(3); and

3. Defendant is ORDERED to pay plaintiff's attorney fees and costs. Plaintiff shall submit a statement of fees and costs related to this matter to the Court by September 15, 1998. Defendant may file a response to plaintiff's submittal by September 30, 1998. The Court will then determine the appropriate amount of attorneys fees and costs to be awarded, and will so advise the parties.

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compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement. The Court is bound by the statutory cap set forth in § 1981a however, and cannot award plaintiff compensatory damages in excess of that cap.

Because the amount of compensatory damages awarded by the Court is $300,000.00), the Court is thus prohibited by the statutory cap from awarding plaintiff any punitive damages. *See* 42 U.S.C. § 1981a(b)(3) ("The sum of the amount of compensatory damages awarded . . . and the amount of punitive damages awarded . . . shall not exceed . . . $300,000.00"). For the record, however, the Court finds that punitive damages are justified in this case, as defendant has "engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual," 42 U.S.C. § 1981a(b)(1), and, absent the statutory cap, the Court would have awarded punitive damages based upon DuPont's repeated failure to remedy this egregious situation.

APPENDIX B

STATUTORY PROVISIONS

1. Section 706(g) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261, as amended, which is codified at 42 U.S.C. 2000e-5(g), provides:

> **Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders**
>
> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.
>
> (2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or

was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

2. Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072-1074, which is codified as 42 U.S.C. 1981a, provides:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of

1964 (42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section,

in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(b)(5)) or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)).

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar

weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the

Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

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Supreme Court, U.S.
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No. 00-763

IN THE

Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL WOMEN'S LAW CENTER, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NOW LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AND AARP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 00-763

SHARON B. POLLARD, *Petitioner*,

v.

E.I. DUPONT DE NEMOURS COMPANY, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL WOMEN'S LAW CENTER, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NOW LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AND AARP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy,

[1] Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici* state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the *amici* and their counsel, made any monetary contribution to its preparation or submission.

in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging racial discrimination in employment.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. For the past three decades, the ACLU's Women's Rights Project has been at the forefront of the battle to secure equal rights for women in the workplace. Because Title VII is one of the nation's most important antidiscrimination statutes, its proper interpretation and effective enforcement is a matter of great concern to the ACLU and its members throughout the country.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. NWLC has worked since 1972 to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, and NWLC played a leading role in urging the enactment of the Civil Rights Act of 1991, and in particular its inclusion of compensatory and punitive damages as remedies for victims of sexual harassment and other forms of sex discrimination.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women,

quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.

The NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination. NOW Legal Defense has appeared before this Court, both as direct counsel and as *amicus*, in numerous employment discrimination cases.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a longstanding interest in employment discrimination based on race and civil rights issues that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The American Federation of Government Employees ("AFGE") is a labor organization affiliated with the AFL-CIO which represents approximately 600,000 employees of the United States federal government and the government of the District of Columbia. On behalf of its members, AFGE presents grievances and complaints, including administrative and judicial Equal Employment Opportunity (EEO) complaints, and carries on legislative activity to improve the welfare of the employees it represents.

AARP is a nonprofit membership organization of more then 34 million people age 50 or older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. More than forty percent of AARP's members remain active in the work force and, thus, are protected by the federal employment discrimination laws, including Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. The proper interpretation and application of these statutes are of paramount importance to the millions of workers who rely on them to remedy invidious bias in the work place.

Many of the *amici* were closely involved with the enactment of the Civil Rights Act of 1991, and in particular with the provision of compensatory damages as a remedy for intentional discrimination under Title VII of the Civil Rights Act of 1964 and under other civil rights laws. These *amici* provided information to Congress through testimony on behalf of the organizations, through contacts with members of Congress and their staffs, and

through the identification of victims and other persons for Committee staff to consider as potential witnesses in hearings.[2]

SUMMARY OF ARGUMENT

This case presents the question of whether so-called "front pay" awards — a form of prospective relief awarded by courts in employment discrimination cases under Title VII of the Civil Rights Act of 1964 — are an element of "compensatory damages" subject to the dollar caps set forth in 42 U.S.C. § 1981a.[3] Both prior to and following the enactment of the Civil Rights Act of 1991 (the "1991 Act"), courts recognized front pay as a form of equitable relief that was available under § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), in cases where an order of immediate reinstatement (or similar immediate injunctive relief) would impose unnecessary hardships on the plaintiff or on innocent third parties. The issue before this Court is whether, by adding a limited right to recover compensatory and punitive damages to Title VII in 1991, Congress meant to disrupt the settled view of front pay as an equitable remedy available under § 706(g).

In this brief, *amici* demonstrate that the 1991 Act did not alter the nature of front pay as an equitable remedy and that front pay therefore is not subject to the § 1981a damages caps. In Part I below, we show that front pay is an essential element in the arsenal of equitable remedies available under Title VII. Prior to

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[2] *See, e.g.*, Report of the Senate Committee on Labor and Human Resources, S. REP. NO. 101-315 at 8-9 (1990) (listing witnesses); Report of the House Committee on Education and Labor, H.R. REP. NO. 102-40, pt. 1 at 17-18 (1991) (listing witnesses); 136 CONG. REC. 18,054 (1990) (statement of Sen. Kennedy); 137 CONG. REC. 28,898 (1991) (statement of Sen. Warner regarding AFGE).

[3] Rev. Stat. § 1977A, as added by § 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991).

1991, courts found that, in certain circumstances, equitable considerations weigh against the granting of immediate reinstatement to a plaintiff who might otherwise be entitled to such relief. For example, in some cases, an order directing immediate reinstatement, hiring or promotion of a plaintiff might displace or "bump" other employees who had not engaged in any wrongdoing. In other cases, a hostile work environment makes reinstatement problematic. In such cases, courts developed the front pay remedy to provide the plaintiff full prospective relief while avoiding unnecessary harm to innocent third parties or the plaintiff herself. These considerations were not affected by the 1991 Act, and courts therefore have continued to treat front pay as an essential tool in their set of equitable remedies.

In Part II below, we show that Congress did not intend to subject this equitable front pay remedy to the damages caps in § 1981a. The purpose of the 1991 Act was to *expand* the remedies available under Title VII, not to limit remedies that federal courts had already recognized. While the language of the statute is plain on its face, the legislative history of § 1981a removes any shadow of a doubt regarding Congressional intent. Indeed, the bipartisan sponsors of the Act expressly stated that they did not intend to make front pay an element of compensatory damages. Moreover, the concern that led Congress to cap front pay awards—the prospect of a runaway jury verdict—did not apply to front pay. Congress understood that, under Title VII, such awards were made by courts, not juries, were available only in certain circumstances, and were subject to appellate review for abuse of discretion.

Finally, in Part III below, we show that classifying front pay as an element of "compensatory damages" would undermine the enforcement of Title VII. In particular, such a ruling would sharply limit the ability of courts to craft appropriate equitable relief and would deter voluntary compliance with the statute by

curtailing an employer's incentive to remedy discrimination promptly.

ARGUMENT

I. Front Pay Is an Integral Part of the Equitable Remedial Scheme Under § 706(g) of the Civil Rights Act.

Since 1972, § 706(g) of the Civil Rights Act of 1964 has authorized courts to remedy employment discrimination by ordering "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). Although federal courts have long recognized front pay as a form of "other equitable relief" available under that section, this Court has never directly addressed the issue of whether, and under what circumstances, § 706(g) authorizes an award of front pay.[4] Accordingly, we begin by demonstrating that (1) courts developed front pay long before 1991 to provide a substitute form of prospective relief in situations where an order of immediate reinstatement (or similar relief) would not have been as equitable, and (2) following passage of the 1991 Act, courts have continued to award front pay in appropriate cases under § 706(g) as an equitable substitute for immediate reinstatement.

A. Courts Developed Front Pay To Provide a Prospective Remedy in Cases Where Equitable Considerations Weigh Against Immediate Reinstatement.

The primary goal of Title VII is, and always has been, the eradication of discrimination within the workplace, preferably by

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[4] *See Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777 n.38 (1975) (declining to reach front pay issue under Title VII); *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995) (holding that neither reinstatement nor front pay is appropriate in age discrimination action where employee would have been terminated on lawful grounds in any event).

encouraging "cooperation and voluntary compliance" with the law. *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982). Where such efforts fail, Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), by restoring them "so far as possible . . . to a position where they would have been were it not for the unlawful discrimination," *id.* at 421 (citations and internal quotation marks omitted). The remedial provisions of Title VII are designed to effectuate these "twin statutory objectives." *Id.*

In the ordinary Title VII case, a plaintiff who proves that an employer engaged in an unlawful employment practice that results in the loss of a job or position is presumptively entitled to obtain both back pay and reinstatement (or analogous injunctive relief like promotion or hiring). *Albemarle*, 422 U.S. at 421. But courts are not limited to the equitable remedies expressly mentioned in the statute. Rather, "federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764 (1976).

Courts originally developed the front pay remedy to provide prospective relief to plaintiffs in situations where an immediate order of reinstatement or promotion would have imposed undue hardships on innocent third parties. In *Patterson* v. *Am. Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), one of the earliest front pay cases, an employer and its labor unions had adopted discriminatory procedures for the promotion of African-American and female employees. To remedy the problem, the district court proposed to implement a company-wide seniority program, which would have permitted senior African-American and female employees to "bump" junior employees from the jobs they already held. The Fourth Circuit rejected this remedy, reasoning that it

would penalize innocent employees, who might themselves have been victims of discrimination. *See id.* at 268. As an alternative, the court decided to extend the back pay remedy beyond the date of judgment. The court explained that:

> "Some employees who have been victims of discrimination will be unable to move immediately into jobs to which their seniority and ability entitle them. The back pay award should be fashioned to compensate them until they can obtain a job commensurate with their status. This may be accomplished by allowing back pay for a period commencing at the time the employee was unlawfully denied a position until the date of judgment, subject to the applicable statute of limitations. This compensation should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position. . . . Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit." *Id.* at 269.

The *Patterson* court recognized that this solution would not provide the plaintiffs with the same satisfaction as immediate promotion. But it held that this benefit must be "[w]eighed against . . . the harm that demotion will cause to incumbents who have done no wrong and the disruption of the company's business that bumping entails. . . . [F]ull monetary compensation and the removal of barriers to promotion provide adequate relief to minority employees without disruption to other employees and management." *Id.* at 269-70.

Following *Patterson*, numerous courts recognized front pay as an appropriate substitute remedy where immediate reinstatement or promotion would have had an adverse impact on innocent third

parties. *See, e.g.*, *King* v. *Staley*, 849 F.2d 1143, 1145 (8th Cir. 1988) (awarding successful claimant front pay rather than a promotion to a position that had been filled by another employee because doing so "would have injured an innocent incumbent"); *Walsdorf* v. *Bd. of Comm'rs*, 857 F.2d 1047, 1054 (5th Cir. 1988) (awarding front pay rather than promotion to "avoid tampering with the rights of other employees who did not participate in the discriminatory activity"). In these situations, courts awarded front pay to compensate the plaintiff for the period "between the date of judgment and the date the plaintiff attains the position he or she would have occupied but for the discrimination." *Shore* v. *Fed. Express Corp.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *see also Edwards* v. *Occidental Chem. Corp.*, 892 F.2d 1442, 1449 (9th Cir. 1990) (affirming award of front pay from date of judgment to date plaintiff received promotion).

Courts also found that front pay was a necessary part of their equitable powers in other situations, such as harassment cases where the animosity between the parties became so great that reinstatement was no longer feasible. For example, in *Goss* v. *Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984), the plaintiff was constructively discharged after a lengthy pattern of abuse and hostility from her supervisors. The trial court concluded that it would not be "sensible to order plaintiff reinstated to a job in which harmonious working relationships are so important after the acrimony this case has engendered," and accordingly ordered front pay in lieu of reinstatement. *Id.* at 890; *see also Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (affirming award of front pay where defendant engaged in "psychological warfare" against the plaintiff). In these situations, courts ordered front pay for the period of time deemed necessary to permit the plaintiff to find comparable employment elsewhere. *E.g.*, *Goss*, 747 F.2d at 890 (affirming award of four months front pay where court found plaintiff was likely to earn comparable wages to old job within short period of time);

Fitzgerald, 624 F.2d at 956-57 (affirming award front pay award for period of time necessary for plaintiff to "reach[] a place where she could recover equivalent pay and could exercise equivalent responsibility").

This line of authority was bolstered by this Court's decision in *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), which held that claims of "hostile environment" sex discrimination are actionable under Title VII. *Id.* at 73. Courts held that where harassment was sufficiently extreme, it would not be reasonable to expect the victim to return to the workplace where the harassment occurred, and that front pay was therefore warranted as a substitute form of prospective relief. For example, in *Hansel* v. *Public Service Co. of Colorado*, 778 F. Supp. 1126 (D. Colo. 1991), the plaintiff worked in a power plant.[5] Over an eight year period, she was subjected to severe harassment that repeatedly placed her in physical jeopardy. For example, on one occasion, a male co-worker hit her over the head with a crescent wrench with such force that her helmet was dented. *Id.* at 1128. On another occasion, two co-workers offered her a ride, and then sexually assaulted her in their car. *Id.* at 1129. The windshield on the plaintiff's car was broken twice in the employee parking lot. *Id.* And on one occasion, a male co-worker held a hangman's noose in front of the plaintiff and suggested that she kill herself. *Id.* Two psychologists testified that as a result of these and numerous other incidents, the plaintiff suffered from post traumatic stress disorder. The court found that under these circumstances, reinstatement was an "impossible option" for the plaintiff, noting that "not only would returning to [the plant] jeopardize her mental health, but many of the men who were her worst harassers are now in supervisor positions." *Id.* at 1135. Accordingly, the court held that plaintiff was entitled to front pay in lieu of reinstatement

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[5] Although *Hansel* was issued shortly after the passage of the 1991 Act, it was decided under pre-1991 law. 778 F. Supp. at 1136-37.

to "make her whole" until she was able to find alternative employment.[6]

In sum, courts developed the front pay remedy because, in seeking to do equity as directed by § 706(g), they found it appropriate in certain types of cases to provide the plaintiff with prospective monetary relief rather than immediate injunctive relief. In some cases, as in *Patterson*, courts sought to balance the plaintiffs' interests against those of innocent employees, while in other cases, as in *Hansel*, courts sought to protect the plaintiff herself from further physical or psychological harm. Prior to the adoption of the Civil Rights Act of 1991, every federal court of appeals to consider the question had concluded that front pay was available under § 706(g) in appropriate cases.[7]

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[6] *See also Daniels* v. *Essex Group, Inc.*, 740 F. Supp. 553, 555-58, 562 (N.D. Ind. 1990) (awarding front pay where African American employee subjected to threats and severe workplace harassment on account of race), *aff'd*, 937 F.2d 1264 (7th Cir. 1991); *Sowers* v. *Kemira*, 701 F. Supp. 809, 815-20, 827 (S.D. Ga. 1988) (awarding front pay to sexual harassment plaintiff where her psychiatrist advised her not to return to workplace); *Pease* v. *Alford Photo Indus.*, 667 F. Supp. 1188, 1191-93, 1203 (W.D. Tenn. 1987) (awarding front pay to sexual harassment plaintiff); *Arnold* v. *City of Seminole*, 614 F. Supp. 853, 873 (E.D. Okla. 1985) (awarding front pay to sexual harassment plaintiff).

[7] In addition to the cases cited in the text, see *Johnson* v. *Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 382-83 (5th Cir. 1988); *Pecker* v. *Heckler*, 801 F.2d 709, 713 & n.8 (4th Cir. 1986); *Thorne* v. *City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Thompson* v. *Sawyer*, 678 F.2d 257, 292-93 (D.C. Cir. 1982); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932 (10th Cir. 1979); *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977); *EEOC* v. *Enter. Ass'n Steamfitters Local 638*, 542 F.2d 579, 590 (2d Cir. 1976). For additional cases, see Appendix A to Petitioner's Brief.

Courts have also awarded front pay under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Front pay under the ADEA remains an especially important remedy for older workers who often face longer and more difficult job searches than younger workers. The

B. Since 1991, Courts Have Continued To Treat Front Pay as an Essential Part of Their Equitable Remedial Powers Under § 706(g).

The 1991 Act did not make any substantive change in § 706(g),[8] and courts have therefore continued to treat front pay as an available remedy under that section. *See, e.g., EEOC* v. *W&O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000) ("[F]ront pay retains its equitable nature . . . after passage of the Civil Rights Act of 1991."); *Barbour* v. *Merrill*, 48 F.3d 1270, 1279 (D.C. Cir. 1995) (when "preferred remedy" of hiring or reinstatement is unavailable, front pay is appropriate). Courts have found front pay relief to be an essential part of their equitable relief powers that is separate and distinct from the compensatory damages remedy under § 1981a, and have awarded front pay in a wide variety of situations where the balance of the equities weighs against immediate reinstatement or other injunctive relief. *See, e.g., Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1998) (affirming front pay award where reinstatement was unavailable because subsequent merger eliminated division where employee had worked); *Selgas* v. *Am. Airlines, Inc.*, 104 F.3d 9, 14 & n.7 (1st Cir. 1997) (affirming front pay award where plaintiff was unable to return to work for approximately 18 months).

For example, as the hostile work environment case law has developed in the years since *Meritor*, courts have continued to find front pay an especially appropriate remedy where the harassment has already caused the plaintiff significant psychological injuries. *See, e.g., Gotthardt* v. *Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999) (affirming

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remedial provisions of the ADEA, however, are quite different from those of § 706(g). *See* discussion *infra* note 16.

[8] The 1991 Act redesignated the existing § 706(g) as paragraphs (1) and (2)(A), and added a new paragraph (2)(B). Pub. L. No. § 102-166, § 107(b),105 Stat. 1075 (1991).

award of front pay where court found pattern of harassment that caused plaintiff to suffer post traumatic stress disorder); *Baty* v. *Willamette Indus., Inc.*, 172 F.3d 1232, 1240 (10th Cir. 1999) (affirming front pay award where plaintiff suffered post traumatic stress disorder as a result of harassment); *Hukkanen* v. *Int'l Union of Operating Eng'rs*, 3 F.3d 281, 285 (8th Cir. 1993) (affirming front pay award where supervisor touched plaintiff in offensive manner and threatened to rape her at gunpoint).

In keeping with the equitable nature of the front pay remedy, courts emphasize that they have broad discretion to tailor the award to the "individualized circumstances of the plaintiff and the employer." *Davoll* v. *Webb*, 194 F.3d 1116, 1144 (10th Cir. 1999).[9] The front pay case law reflects the individualized, flexible nature traditionally associated with equity. *See, e.g, Florida* v. *Long*, 487 U.S. 223, 237 (1988) ("Our power to order appropriate relief under Title VII is equitable in nature and flexible . . ."). For example, courts have held that they have broad discretion to determine the proper mix of remedies that will fully compensate a plaintiff. *E.g.*, *Selgas*, 104 F.3d at 13; *see also Albemarle*, 422 U.S. at 415-16 ("The [Title VII] scheme implicitly recognizes that there may be cases calling for one remedy but not another."). Thus, a court may award both front pay and reinstatement in a proper case, so long as the awards are not duplicative and cover distinct periods of time. *Selgas, 104 F.3d* at *13* (affirming hybrid award of reinstatement and front pay); *see also Lussier* v. *Runyon*, 50 F.3d 1103, 1112 (1st Cir. 1995) ("A front pay award—like any

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[9] In *Davoll*, the court noted that relevant factors may include "work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value." *Id.*; *see also Barbour* v. *Merrill*, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (discussing factors relevant to determination of front pay award).

other single strand in a tapestry of relief—must be assessed as a part of the entire remedial fabric that the trial court has fashioned in a particular case."). In short, following the 1991 Act, courts have continued to treat front pay as an indispensable arrow in their quiver of equitable remedies under § 706(g).

II. Congress Did Not Intend To Subject Front Pay Awards to the Caps for Compensatory and Punitive Damages When It Adopted the Civil Rights Act of 1991.

The plain language of 42 U.S.C. § 1981a demonstrates that front pay awards are not subject to the dollar caps on compensatory and punitive damages that Congress added to the statute in 1991. As we have just shown, front pay is a form of equitable relief that is available under § 706(g). As such, it is excluded from the definition of "compensatory damages" in § 1981a(b)(2).[10] Front pay therefore is not subject to the caps in § 1981a(b)(3), which by their terms apply only to "compensatory damages" and "punitive damages." Apart from the Sixth Circuit, every court of appeals that has considered the issue has reached this conclusion. *See EEOC* v. *W&O, Inc.*, 213 F.3d 600, 618-19 & n.10 (11th Cir. 2000); *Gotthardt* v. *Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1153-55 (9th Cir. 1999); *Martini* v. *Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999), *cert. dismissed*, 528 U.S. 1147 (2000); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 555-56 (10th Cir.), *cert. denied*, 528 U.S. 813 (1999); *Kramer* v. *Logan County Sch. Dist.*, 157 F.3d 620 (8th Cir. 1998).

As we now demonstrate, however, the plain language of the statute is reinforced by an overwhelming volume of evidence

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[10] Section 1981a(b)(2) provides that: "Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)]."

demonstrating that Congress did not intend to subject front pay to the damages caps.

A. The Purpose of § 1981a Was to Expand the Remedies Available to Title VII Plaintiffs, Not To Limit Remedies That Courts Had Already Recognized.

Congress enacted § 1981a to address a historical quirk in the nation's civil rights laws. Prior to 1991, Title VII protected employees from workplace discrimination on the basis of race, sex, religion or national origin, but permitted plaintiffs to obtain only equitable relief. *See generally Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 252-53 (1994). Employees who alleged intentional race discrimination, however, had the additional option of bringing a claim under 42 U.S.C. § 1981, which — in addition to equitable relief — permits a plaintiff to recover compensatory and punitive damages. *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975). Thus a victim of intentional racial discrimination could recover damages for out-of-pocket losses and other monetary harms, as well as impairment of reputation, personal humiliation, mental anguish and similar injuries. *See generally Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) (discussing compensatory damages under 42 U.S.C. § 1983). Plaintiffs alleging intentional discrimination on the basis of sex or religion, however, could not recover such damages. Section 1981a partially rectified this anomaly by extending a limited right to compensatory and punitive damages to Title VII plaintiffs in such cases. *See Landgraf*, 511 U.S. at 253-55.

As this Court has previously recognized, the intent of the new section was solely to *expand* the remedies available to Title VII plaintiffs. *See Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) ("With the passage of the 1991 Act, Congress provided for additional remedies . . ."); *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 308 (1994) (noting that the Act expanded the scope of relevant civil rights statutes); *Landgraf*, 511 U.S. at 253. The

legislative history confirms this conclusion. Like the rest of the 1991 Act, § 1981a was the product of extensive negotiations between Congress and President Bush. In 1990, both houses of Congress approved a predecessor version of the Act designed to partially rectify this anomaly. As originally reported by the Senate Committee on Labor and Human Resources, the 1990 Act would have given Title VII plaintiffs an unlimited right to recover compensatory and punitive damages. S. REP. NO. 101-315, at 4 (1990).[11] The Senate Committee report explained that the existing Title VII remedies were inadequate, especially in harassment cases where a plaintiff might suffer significant psychological and medical injuries in addition to loss of wages:

> "Victims of sexual or religious harassment and other intentional discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems. And victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies. Limiting relief to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination; and thus victims of intentional discrimination are discouraged from seeking to vindicate their civil rights." *Id.* at 30.

Opponents of the legislation sharply criticized this proposal, arguing that the prospect of unlimited damages would deter settlement and lead to significant increases in the volume of Title VII litigation that would place unreasonable burdens on em-

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[11] Similar versions of the bill were favorably reported by the House Committee on Education and Labor, H.R. REP. NO. 101-644, pt. 1, at 5-6 (1990), and the House Committee on the Judiciary, H.R. REP. NO. 101-644, pt. 2, at 5-6 (1990).

ployers. *See* S. REP. NO. 101-315, at 95-98 (minority views of Sens. Hatch, Thurmond and Coats); H.R. REP. NO. 101-644, pt. 1, at 131-39 (1990) (minority views); H.R. REP. NO. 101-644, pt. 2, at 66-69 (minority views of Rep. Sensenbrenner et al.) (1990).

As ultimately passed, the 1990 Act attempted to respond to these concerns by limiting punitive damages to the greater of $150,000 or the sum of compensatory damages and equitable monetary relief awarded. H.R. CONF. REP. NO. 101-755, at 5-6, 16 (1990). President Bush vetoed the Act, however, 136 CONG. REC. 33,377 (1990), and a motion to override the veto in the Senate failed by a single vote, *id.* at 33,406.

To avert a second veto, a bipartisan group headed by Senators Danforth and Kennedy worked with President Bush to develop compromise legislation. The compromise proposal passed both chambers of Congress by substantial margins, and President Bush signed the 1991 Act into law on November 25, 1991. Like the 1990 Act, the 1991 Act was designed to grant a compensatory and punitive damages remedy to victims of intentional discrimination who could not recover under § 1981. A Section-By-Section Analysis submitted in the House by Representative Edwards explained that:

> "The creation of a damages remedy for intentional discrimination is necessary to conform remedies for intentional gender, disability, and certain forms of religious discrimination to those currently available to victims of intentional race, national origin and other forms of religious discrimination as well as to provide a more effective damages remedy in the public sector. . . . [I]t is simply untenable to continue any longer the disparity in the civil rights laws which permits the recovery of compensatory and punitive damages in cases of intentional race discrimination but to deny these same remedies to victims of other forms of discrimination." 137 CONG. REC. 30,661 (1991).

Unlike the 1990 Act, however, the 1991 Act imposed a sliding cap on compensatory and punitive damages in Title VII actions. The damages cap was a key element of the compromise. Lawmakers who had previously opposed the 1990 Act made it clear that they had never had any objection to the basic principle of making compensatory damages available under Title VII, provided that appropriate limits were in place to prevent runaway jury verdicts. Senator Hatch, for example, supported the compromise bill, remarking that:

> "[F]or the first time, damages will be available under [T]itle VII and for the first time you will have a right to collect damages for sexual harassment, something that is long overdue in the law, something for which I have argued from the beginning of this whole debate — something that President Bush had been willing to do in his own bill." 137 CONG. REC. 28,851 (1991).

Congress explicitly recognized that the new remedy it was creating applied to non-wage damages and thus was separate from the wage-related back pay and front pay remedies that were already available under Title VII. An Interpretive Memorandum submitted by Senator Danforth, *see* 137 CONG. REC. 29,045-47 (1991), which reflected the consensus views of both Senator Kennedy and the Republican sponsors of the bill,[12] explained that:

> "It is the intention of the sponsors of this legislation to make the perpetrators of intentional discrimination liable for the *non-wage economic consequences* of that

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[12] The Court attached little weight to this Memorandum in *Landgraf*, *see* 511 U.S. at 262 n.15, because the Democratic and Republican sponsors disagreed as to the question of retroactivity at issue in that case. With respect to the issue in this case, however, the Memorandum reflects a consensus view of Senators from both parties.

> discrimination up to the full extent of the stated limitations." *Id.* at 29,046 (emphasis added).

Nothing in the legislative history suggests that by adding a limited right to recover non-wage damages in intentional discrimination cases, Congress sought to limit front pay or any other existing Title VII remedies. To the contrary, Senator Danforth's Memorandum expressly stated that:

> "[T]he following limitations . . . are placed on the damages available to each individual complaining party for each cause of action brought under section 1981A:
>
> "Such damages cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII . . . ." *Id.*[13]

Similar language appears in Representative Edwards's Section-By-Section Analysis from the House:

> "The new damages provision does not limit either the amount of damages available in section 1981 actions or the circumstances under which a person may bring suit under that section . . . .
>
> "Damages awarded under section 1977A cannot include remedies already available under Title VII including backpay, the interest thereon, front pay, or any other relief authorized under Title VII . . . ." 137 CONG. REC. 30,661 (1991).

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[13] *See also* 137 CONG. REC. 28,637 (1991) (remarks of Sen. Kennedy) ("Compensatory damages do not include backpay, interest on backpay, or any other type or relief authorized under section 706(g) of the Civil Rights Act of 1964, including front pay.").

These bipartisan statements confirm that Congress did not intend to disturb the existing scheme of equitable remedies, including front pay, when it enacted § 1981a.

B. The Factors That Led Congress To Cap Compensatory and Punitive Damages Awards Are Not Applicable to Front Pay Awards.

It is not surprising that the sponsors of the 1991 Act did not attempt to subject front pay to the kinds of caps that they created for compensatory and punitive damages in § 1981a. As shown above, the legislative history indicates that the damages caps were adopted to respond to concerns that a new unlimited right to compensatory and punitive damages would deter settlements and result in runaway jury verdicts. Critics of the 1990 Act, for example, repeatedly cited a study by the RAND Corporation, which found compensatory and punitive damages awards in wrongful discharge cases in California ranging from $7,000 to $8,000,000, with an average recovery of $307,628. *E.g.*, S. REP. NO. 101-315, at 97-98 (1990). As Senator Wirth remarked during the debates on the compromise proposal, "President Bush has made it clear – no caps, no bill." 137 CONG. REC. 29,022 (1991).[14]

But while Congress was evidently concerned about the prospect of excessive compensatory and punitive damages awards,

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[14] In his remarks upon signing the 1991 Act, President Bush confirmed that he viewed damages caps as a necessary safeguard against jury awards:

> "[An] important source of the controversy that delayed enactment of this legislation was a proposal to authorize jury trials and punitive damages in cases arising under Title VII. [The 1991 Act] adopts a compromise under which 'caps' have been placed on the amount that juries may award in such cases. The adoption of these limits on jury awards sets an important precedent, and I hope to see this model followed as part of an initiative to reform the Nation's tort system." Statement of President George Bush Upon Signing S. 1745, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 25, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768, 769.

it did not have a similar concern about front pay awards. The reason is simple: Congress was familiar with the existing case law under Title VII and knew that as the front pay remedy had been applied, there was little potential for runaway awards. *See, e.g., Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

First, Congress was aware that courts had treated front pay under Title VII as an equitable remedy awarded by courts rather than juries. Prior to 1991, federal courts were virtually unanimous that no jury trial right existed under Title VII because the statute provided only equitable remedies.[15] District courts thus awarded back pay and front pay without a jury. Congress reasonably expected this practice to continue following the 1991 Act. See 137 CONG. REC. 29,046 (1991) ("The courts shall continue to exercise their discretion in the handling of . . . hybrid actions as they have in handling the many hybrid actions brought under Title VII/ section 1981 in the past."). Since front pay was not perceived as a jury issue, there was no concern over the prospect of runaway front pay verdicts.[16]

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[15] *See, e.g., Wade* v. *Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Johnson* v. *Ga. Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds sub nom. Local 223, Util. Workers Union* v. *EEOC*, 431 U.S. 951 (1977); *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978); *Slack* v. *Havens*, 522 F.2d 1091 (9th Cir. 1975). *See also Lehman* v. *Nakshian*, 453 U.S. 156, 164 (1981) (stating in dicta that "there is no right to trial by jury in cases arising under Title VII").

[16] In this regard, it is important to distinguish Title VII cases from cases arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. The remedial provisions of the ADEA are quite different from Title VII; they expressly authorize legal as well as equitable

Second, Congress knew that the legal rules courts had developed for front pay made excessive awards unlikely. Courts had made it clear that front pay was only appropriate where equitable considerations weighed against immediate reinstatement. *See, e.g., Thorne* v. *City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885 (3d Cir. 1984); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980). Courts had held that front pay, like back pay, was subject to the employee's duty to mitigate by making reasonable and diligent efforts to find comparable employment elsewhere. *See Castle* v. *Sangamo Weston, Inc.*, 837 F.2d 1550, 1562 (11th Cir. 1988); *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984). And courts had held that front pay awards had to be reasonably limited in duration. *See Carter* v.

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relief, and expressly grant a right to "trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter." 29 U.S.C. § 626(c). Thus back pay awards under the ADEA are for the jury to decide. *See Lorillard* v. *Pons*, 434 U.S. 575, 580-84 (1978).

The Circuits are split regarding the award of front pay under the ADEA. The Third, Fifth, Sixth, and Ninth Circuits have held that the decision to award front pay under the ADEA is a matter within the discretion of the trial court, but that the amount of front pay is for the jury to decide. *See Fite* v. *First Ten.n. Prod. Credit Ass'n*, 861 F.2d 884, 892-93 (6th Cir. 1988); *Cassino* v. *Reinhold Chem., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987); *Maxfield* v. *Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985); *Hansard* v. *Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989). The First, Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits, by contrast, have held that both the propriety and the amount of front pay are solely the province of the court. *See Denison* v. *Swaco Geolograph Co.*, 941 F.2d 1416, 1426 (10th Cir. 1991); *Fortino* v. *Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991); *Duke* v. *Uniroyal, Inc.*, 928 F.2d 1413, 1421-24 (4th Cir. 1991); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985); *Dominic* v. *Consol. Edison of N.Y., Inc.*, 822 F.2d 1249, 1257 (2d Cir. 1987); *Ramsey* v. *Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988); *Newhouse* v. *McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997). This issue does not arise in the Title VII context, however, because Title VII does not provide the ADEA's broad statutory right to a jury trial.

Sedgwick County, 929 F.2d 1501,1505 (10th Cir. 1991); *Shore* v. *Fed. Express Corp.*, 777 F.2d 1155, 1160 (6th Cir. 1985).

Finally, Congress knew that federal appellate courts had reviewed front pay awards for abuse of discretion, and thus such awards would not be accorded the same deference traditionally accorded to jury verdicts. *E.g.*, *Wulf* v. *City of Wichita*, 883 F.2d 842, 873 (10th Cir. 1989); *Burns* v. *Tex. City Refining, Inc.*, 890 F.2d 747, 753 (5th Cir.1989); *Graefenhain* v. *Pabst Brewing Co.*, 870 F.2d 1198, 1201 (7th Cir. 1989); *cf.* 137 CONG. REC. 30,662 (1991) ("The sponsors recognize the limited role of the judiciary in reviewing jury awards and intend that only this well-established supervisory role be applied to the review of jury awards under [§ 1981a]"). For all of these reasons, the factors that led Congress to cap compensatory and punitive damages were not applicable to the issue of front pay.

III. Subjecting Front Pay to the Damages Caps Would Severely Undermine the Enforcement of Title VII.

We now turn to the consequences that would result if this Court were to conclude that front pay is an element of "compensatory damages" subject to the caps in § 1981a. By limiting the remedies available under Title VII, rather than expanding them as Congress intended (see discussion *supra* Part II.A), such a decision would frustrate the objectives of the statute and undermine its enforcement.

A. Making Front Pay Part of "Compensatory Damages" Would Undermine the Ability of Courts To Craft Appropriate Equitable Relief in Title VII Cases.

Construing front pay as an element of "compensatory damages" would sharply impair the ability of courts to fashion appropriate equitable relief under § 706(g) in two respects. First, because either party can demand a jury trial as to compensatory damages, the courts would lose control over this element of their

equitable powers in every case where the plaintiff seeks front pay.[17] Second, in cases, such as this, where the plaintiff has already incurred damages equal to or in excess of the statutory cap, such a construction would leave immediate injunctive relief as the only available prospective remedy.

As to the former point, given that front pay exists as an alternative to immediate reinstatement, it obviously would be both disruptive and confusing to allot one of these alternatives (front pay) to a jury and the other (reinstatement) to the court. Such a course would compromise the court's flexibility to fashion the most appropriate form of equitable relief. For example, where a judge deem reinstatement to be problematic and award front pay instead, a jury might deny front pay or award only a nominal sum. *See Dominic* v. *Consol. Edison Co. of N.Y., Inc.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (discussing problems that would be created if jury were allowed to decide amount of front pay). In those situations, courts would have little choice but to order immediate reinstatement, since the alternative would be to provide no prospective relief for the victims of discrimination.

As to the latter point, the court's discretion would be even more severely limited in situations where the plaintiff's compensatory damages (for emotional distress, medical expenses, etc.) exceed the cap, leaving no room for a front pay award. In such cases, front pay would effectively be eliminated as a remedy, and courts would have no alternative but to order immediate reinstatement. Ironically, this problem would likely be most severe in the cases involving small businesses that Congress sought to protect when it adopted the damages caps in § 1981a. Because Congress was concerned about the potential impact of

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[17] *See* 42 U.S.C. § 1981a(c) ("If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury.").

large jury awards on small businesses, § 1981a imposes a sliding scale of damages caps, ranging from $50,000 for the smallest companies (15 to 100 employees) to $300,000 for the largest companies (more than 500 employees). 42 U.S.C. § 1981a(b)(3). Thus if front pay were subject to the caps, it would be most stringently limited for the employees of small businesses. Yet reinstatement is likely to be more difficult for small employers than for large ones, simply because there are fewer jobs available in smaller companies. Thus in all likelihood, if front pay were subjected to the caps, the most significant disruptions would occur in small businesses. Congress surely did not contemplate this result when it enacted § 1981a.

B. Subjecting Front Pay to the Damages Caps Would Undermine Voluntary Compliance With Title VII.

In *Albemarle*, this Court held that the backpay remedy serves the important function of promoting voluntary compliance with Title VII by giving employers an "incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . ." 422 U.S. at 417-18 (alteration in original). The Court elaborated on this rationale in *Ford Motor Company*, explaining that back pay "encourage[s] Title VII defendants promptly to make curative, unconditional job offers to Title VII claimaints, thereby. . . ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." *Ford Motor Co.*, 458 U.S. at 228.

Much the same analysis applies to front pay awards, which effectively extend the back pay remedy award beyond the date of judgment. *See, e.g.*, *Patterson*, 535 F.2d at 269 ("[B]ack pay must be allowed an employee from the time he is unlawfully denied a promotion . . . until he actually receives it."); *see also* 2 Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION

LAW 1815 (3d ed. 1996) (describing front pay as a "continuation of back pay . . . award beyond the date of judgment"). If employers did not face additional front pay liability once a court has already found a violation of the statute, they would have no incentive to try to remedy the problem. *See EEOC* v. *Enter. Ass'n Steamfitters Local 638*, 542 F.2d 579, 590-91 (2d Cir. 1976) ("It is the date of actual remedying of discrimination, rather than the date of the district court's order, which should govern. . . . [T]o hold otherwise is to encourage the union to delay the remedial process rather than to encourage the rapid achievement of the discrimination victims' rightful place."). Thus, for reasons similar to those identified in *Albemarle* and *Ford*, artificially capping front pay would tend to discourage compliance with Title VII.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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In the

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

v.

E.I. DU PONT DE NEMOURS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND IN SUPPORT OF PETITIONER SHARON B. POLLARD

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INTEREST OF AMICI CURIAE[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs before this Court, singly or jointly with other amici. Some recent cases include *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Kolstad v. American Dental Association,* 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association. ATLA's approximately 50,000 attorney members represent plaintiffs in civil actions, including employees seeking to vindicate their rights under federal civil rights statutes against discrimination in the workplace. Title VII actions serve as an important means for safeguarding those rights. In ATLA's view, the lower court's decision in this case

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[1] Copies of the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, amici state that no persons other than the amici curiae, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

undermines the purpose of Congress in affording this remedy, the elimination of illegal workplace discrimination.

The Connecticut Women's Education and Legal Fund (CWEALF) is a statewide non-profit organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. Founded in 1973, CWEALF has worked for over 27 years on the issue of sexual harassment as well as gender bias in the courts. CWEALF offers workshops on sexual harassment prevention and response to employers, supervisors and employees. It also provides legal information and referrals to women who have been the target of discrimination and harassment.

The interest of NELA, ATLA and CWEALF in this case is to protect the rights of their members' clients and their members, by ensuring that Title VII's goal of eradicating employment discrimination is fully realized. This cannot happen when Title VII is interpreted in a way that prevents courts from providing equitable and monetary relief sufficient to make plaintiffs whole. *Amici* submit this brief because of the importance of the issues at bar to furthering their goals.

INTRODUCTION

With the exception of the Sixth Circuit, federal trial and appellate courts have uniformly concluded that front pay awards are not subject to the monetary caps established by section 102 of the Civil Rights Act of 1991 ("1991 Act").[2] The Sixth Circuit's contrary conclusion[3] misconstrues the plain language of the 1991 Act. Importantly, it will also operate to withhold full relief for victims of the more severe or egregious forms of employment discrimination. Front pay awards for employees who cannot be reinstated because of the harshness of their treatment or the continued hostility between the parties will have their access to compensatory damages reduced by the amount of front pay they are awarded. This will have the perverse effect of rewarding those employers who persist in their antagonism toward a proven target of discrimination. In contrast, reinstatement will be available for the employees of employers who are able to adopt a more benign posture, and in appropriate cases, these employees will also have the full amount of compensatory damages available to them.

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[2] *See* Rev. Stat. §1977A, as added Pub.L. 102-166, 105 Stat. 1072; section 102 is codified at 42 U.S.C. §1981a. Section 102 will hereafter be referred to as "section 1981a."

[3] The court below professed its agreement with the reasoning of other circuits but was bound by the earlier decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997).

SUMMARY OF ARGUMENT

The 1991 Act was enacted to augment the relief available under Title VII of the Civil Rights of 1964. It provided victims of gender, religious and disability discrimination in employment with the right to an award of compensatory and punitive damages.[4] The Act also imposed monetary limits—or "caps"—on the amount of such damages that could be awarded. In enacting the caps, however, Congress was at pains to make clear that the caps were applicable *only* to the newly allowed remedies and not to the relief already authorized by Title VII. That relief included the award of front pay in lieu of reinstatement.

Only the Sixth Circuit has concluded that the caps on compensatory and punitive damages apply to awards of front pay. This conclusion fairly flouts the express language of the 1991 Act, which defines compensatory damages as a remedy "in addition to" the relief previously allowed under Title VII, and which applies the caps only to relief awarded under the 1991 Act.

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[4] Section 1981a's caps apply only to claims of gender, religious and disability discrimination. Victims of race or national origin discrimination have uncapped monetary remedies available under section 1981 (42 U.S.C. §1981). *See Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975). Section 1981a recognizes the dichotomy between gender and religious discrimination and discrimination on the basis of race, color or national origin under Title VII by providing that the compensatory and punitive damages it authorizes are available "provided that the complaining party cannot recover under section 1981 of this Title." *See* 42 U.S.C. §1981a(a)(1). Section 1981a(a)(2) authorizes awards of compensatory and punitive damages in connection with claims filed under the Americans With Disabilities Act. *See* 42 U.S.C. §1981a(a)(2).

The holding of the Sixth Circuit will frustrate the purposes of that Act by permitting results that will actually *reduce* rather than augment the relief available to covered victims of discrimination. Prior to 1991 Title VII allowed awards of front pay without any fixed limitation. Under the reasoning of the Sixth Circuit, those awards may now be capped. This result will be especially perverse in situations where an award of compensatory or punitive damages under the 1991 Act is now appropriate. The target of discriminatory conduct who would normally be allowed an award of compensatory and punitive damages, albeit capped at a maximum of $300,000, plus an award of front pay under the law as it was applied prior to 1991, will now be limited to a total award of $300,000. This result, exactly what has happened in this case, is directly contrary to the intent of Congress in enacting the 1991 Act.

For these reasons, *Amici* urge the Court to reverse the decision below.

ARGUMENT

Front Pay Is Not To Be Counted Toward The Caps On Compensatory And Punitive Damages, Since It Was Among The Remedies "Authorized By Section 706(G) Of The Civil Rights Act Of 1964."

A. Front Pay Was An Important Part Of Title VII's Remedial Scheme Prior To The Enactment Of The 1991 Act.

Section 706(g) of Title VII, in place since 1964, provides that a court may "order such affirmative action as may be appropriate, which may include, but is not limited to

reinstatement or hiring of employees, with or without backpay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). More than twenty-five years ago this Court held that section 706(g) implemented Congress's central purpose "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper v. Moody*, 422 U.S. 405, 418 (1975). *See also Franks v. Bowman Transp. Corp.*, 424 U.S. 747, 764 (1976) (Section 706(g) "empowered [the federal courts] to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.").

Back pay and reinstatement were the remedies of choice, especially in the early years when Title VII litigation more frequently addressed the broad systemic effects of entrenched race discrimination. However, the lower courts also recognized early on that reinstatement was not always feasible, and that when it was not, an award of front pay was a necessary part of the "make whole" relief mandated by Congress and this Court. *See e.g.*, *United States v. United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973), *vacated in part and appeal dismissed in part on other grounds*, 520 F.2d 1043 (5th Cir. 1975); *Bush v. Lone Star Steel Co.*, 373 F.Supp. 526 (E.D. Tex. 1974); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir. 1976) (where reinstatement or promotion is not immediately feasible, back pay "should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position."); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158-9 (6th Cir.

1985) ("Front pay is . . . simply compensation for the post-judgment effects of past discrimination." It is awarded "to effectuate fully the 'make whole' purposes of Title VII.").

Although, unlike back pay and reinstatement, front pay is not expressly mentioned in section 706(g), the lower courts have uniformly recognized that "frontpay is the functional equivalent of reinstatement," and that as such it "falls squarely within the statutory language authorizing 'any other equitable relief.'" *Williams v. Pharmacia*, 137 F.3d 944, 952 (7th Cir. 1998) (citations omitted). *See also Cowan v. Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998) (an award of front pay is an alternative to reinstatement); *Selgas v. American Airlines, Inc.*, 104 F.3d 9, 12 (1st Cir. 1997) (same). As explained by the Seventh Circuit in *Williams*, "[f]ront pay in the Title VII context is best understood as 'a monetary award equal to the gain [the plaintiff] would have obtained if reinstated.'" *Id.*[5]

The legitimacy of front pay awards under the authority of section 706(g) has never been challenged in this Court. Nonetheless, on a number of occasions the Court has implicitly recognized that legitimacy. *See Franks, supra,*

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[5] Front pay is also awarded under other federal statutes regulating employment. *See e.g., Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987) (Age Discrimination in Employment Act: "[F]ront pay is an award of future lost earnings to make a victim of discrimination whole."), *cert. denied*, 484 U.S. 1047 (1988); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998) (Family and Medical Leave Act); *Jones v. Kerrville Stage Hosp.*, 142 F.3d 263 (5th Cir. 1998) (Americans with Disabilities Act); *Doll v. Brown*, 75 F.3d 1200 (7th Cir. 1966) (Rehabilitation Act).

424 U.S. at 777 n. 8 (noting as an alternative remedy "the possibility of an award of monetary damages (sometimes designated 'front pay')") and 424 U.S. at 781 (Burger, C.J. concurring) ("An award such as 'front pay' could replace the need for competitive-type seniority relief [and] would serve the dual purpose of deterring wrongdoing by the employer or union—or both—as well as protecting the rights of innocent employees."); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361-62 (1995) (where an employer has after-acquired evidence of severe misconduct on the part of the plaintiff, "neither reinstatement nor front pay is an appropriate remedy"); *United States v. Burke*, 504 U.S. 229, 239 n.9 (1992) (in considering the taxability of back pay awards, the Court noted that "some courts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover 'front pay' or future lost earnings.").

By the time Congress began to consider the statute that became the 1991 Civil Rights Act, all circuits considering the issue, including the Sixth Circuit, treated front pay as an available remedy under this Section. *See Thompson v. Sawyer*, 678 F.2d 257, 292 (D.C. Cir. 1982) ("A number of circuits have approved the use of such front pay to make plaintiffs whole for the losses caused by discrimination and we join them."); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991) ("Where reinstatement is not appropriate, then other remedies must be considered. We join virtually all circuits that have considered the subject in concluding that front pay is an available remedy to complete the panoply of remedies available to avoid the potential of future loss."). *See also Powers v. Grinnell Corp.*, 915 F.2d 34, 42 (1st Cir. 1990);

Bruno v. W.D. Saunders Co., 882 F.2d 760, 772 (3rd Cir. 1989); *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 870 (5th Cir. 1991); *Shore v. Federal Express*, 777 F.2d 1115, 1159 (6th Cir. 1985); *Morgan v. Arkansas Gazette*, 897 F.2d 945, 954 (8th Cir. 1990); *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984); *Wulf v. City of Wichita*, 883 F.2d 842, 873 (10th Cir. 1989); *Wilson v. S&L Acquisition Co.*, 940 F.2d 1429, 1438 (11th Cir. 1991).

B. The 1991 Act, Which Provided New But Limited Remedies For Victims Of Intentional Discrimination, Was Clearly Intended To Preserve *Without Limit* The Remedies Previously Available Under Section 706(g).

The Civil Rights Act of 1991 expanded upon the remedies available under section 706(g) by allowing victims of intentional discrimination to recover compensatory and punitive damages, although the amounts that may be awarded are capped. *See* 42 U.S.C. §1981a(b). The plain language of the 1991 Act makes clear that these new remedies are over and above those previously "authorized," and that the latter remedies are not to be subject to the monetary caps placed on compensatory and punitive damages. Thus the Act expressly provides that the newly allowed "compensatory and punitive damages [are] *in addition to any relief authorized by Section 706(g).*" 42 U.S.C. §1981a(a)(1) (emphasis supplied). To emphasize that "compensatory and punitive" damages are not to overlap or subsume the remedies already available under Section 706(g), the Act also contains a definitional provision stating that "[c]ompensatory damages . . . shall

not include backpay, interest on backpay, *or any other type of relief authorized under Section 706(g).*" 42 U.S.C. §1981a(b)(2) (emphasis supplied). Finally, the Act imposes caps only on "compensatory damages *awarded under this section* for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. §1981a(b)(3) (emphasis supplied).

Probably the most basic maxim of statutory construction is "that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Here, the language of the statute—the 1991 Act—is dispositive of the issue before the Court.

The 1991 Act for the first time allowed an award of compensatory damages to successful Title VII plaintiffs. In doing so, it *expressly* defined compensatory damages as *excluding* "any . . . type of relief authorized under section 706(g)" of Title VII. As we have shown, there is no question that front pay was so "authorized." Moreover, the monetary caps are expressly made applicable only to "compensatory damages awarded under *this* section." 42 U.S.C. §1981a(b)(3). The phrase "this section" necessarily refers to section 1981a, not section 706(g), so the caps simply have no application to remedies—including front pay—that were available under section 706(g).

These circumstances compel the conclusion that front pay awards are not governed by the monetary caps contained in section 1981a. If the statutory language left

any doubt, the legislative history ends it. The Sponsors' Interpretive Memorandum makes clear that the newly created—and capped—damages "cannot include backpay, the interest thereon, front pay, or any other relief authorized under Title VII." 137 Cong. Rec. S15, 484 (1991). Senator Kennedy, in reporting the final version of the bill to the Senate, stated that "[c]ompensatory damages do not include frontpay." 137 Cong. Rec. S15234 (daily ed. Oct. 25, 1991). Similarly, Representative Edwards reported to the House of Representatives that front pay, like back pay, is not included in the definition of compensatory damages in section 1981a. 137 Cong, Rec. H9527 (daily ed. Nov. 7, 1991).

All the Courts of Appeals that have considered the question, except the Sixth Circuit, have found the caps contained in the 1991 Act inapplicable to front pay. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000); *Kramer v. Logan County School Dist.*, 157 F.3d 620, 626 (8th Cir. 1998); *Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir. 1999); *Martini v. Federal National Mortgage Association*, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999). In a policy guidance adopted after passage of the 1991 Act, the Equal Employment Opportunity Commission concurred. It concluded that "complaining parties may recover full compensation for . . . frontpay . . . . Frontpay is a type of 'relief authorized under Title VII' and, therefore, is excluded from the definition of compensatory damages and is not included in the caps." *See* EEOC Policy Guide on Compensatory and Punitive Damages Under the 1991 Civil Rights Act, 8 FEP Manual

405:7091, 7094 (1992).[6]

The lower court here found itself bound by the Circuit's earlier decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997). *Hudson*, alone among the Courts of Appeal, had concluded that front pay awards *are* subject to section 1981a's monetary caps. It reasoned first that front pay falls within the meaning of the phrase "future pecuniary losses" contained in section 1981a's definition of compensatory damages, and second, that front pay is not "specifically" authorized by section 706(g). 130 F.3d at 1203. Neither reason is persuasive. Both fail "to understand the relevant statutory terms 'in light of the language and structure of the Act as a whole.'" *Medlock v. Ortho Biotech, Inc.*, *supra*, 164 F.2d at 556, quoting *Dole v. United Steelworkers of America*, 494 U.S. 26, 41 (1990). Thus, while it is true that front pay may be a form of future pecuniary loss, the cap by its own terms does not apply to all "future pecuniary losses;" rather its application is limited to "compensatory damages awarded under this section for future pecuniary losses." 42 U.S.C. §1981a(b)(3). Damages "awarded under *this* section"—section 1981a—obviously do not include damages or relief awarded under the authority of section 706(g). And as indicated previously, compensatory damages are defined as being exclusive of relief available under section 706(g).

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[6] These EEOC regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). This Court has held that such a contemporaneous interpretation, which is consistent with the language of the statute, is entitled to great deference. *Washington County v. Gunther*, 101 S.Ct. 2242, 2461, 452 U.S. 161 (1981).

The Sixth Circuit's conclusion that front pay is subject to the caps because it is not "specifically" authorized by section 706(g) is also plainly wrong. As we have seen, section 706(g) does not specifically enumerate the relief a district court may award. To the contrary, it authorizes the award of "such affirmative action as may be appropriate," including reinstatement or backpay and "any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). Section 1981a provides that the compensatory damages it authorizes are "in addition to any relief authorized by Section 706(g)," and it excludes from the definition of compensatory damages "any other type of relief authorized under Section 706(g)." 42 U.S.C. §1981a(a)(1) and (b)(2). Thus, in holding that front pay falls within section 1981a's caps because it is not "specifically" authorized by section 706(g), the Sixth Circuit has added a requirement to section 1981a that drastically alters its meaning. Section 706(g) was written clearly to permit the award of broad equitable relief beyond what is "specifically" mentioned. Section 1981a was written so as to respect this breadth. It uses the phrases "any relief" and "any other type of relief authorized under Section 706(g)" to define the exclusions from its definition of compensatory damages. To give section 1981a the meaning ascribed to it by the Sixth Circuit it would be necessary to add the words "specific" and "specifically" to section 1981a(b)(2) and (3).[7] Such editing is not a

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[7] *Hudson* also concluded that front pay should be included in the caps because otherwise the phrase "future pecuniary losses" would not have any meaning. *See* 130 F.2d at 1203. However, this is simply not the case. A victim of discrimination may well suffer future pecuniary loss over and above lost

(continued...)

function of the judiciary—at least not where the meaning of the language used by Congress is so clear.

C. Application Of The Damage Cap To Front Pay Will Frustrate The Purposes Of The 1991 Act.

An early factor driving the courts to award front pay was the unavailability of an appropriate position for the victim of discrimination. In some cases there was a concern that immediate reinstatement or promotion would unfairly displace innocent incumbent employees; in others, an appropriate position was not immediately available. In these circumstances, the courts readily awarded front pay during the interim between the entry of judgment and the time when it became possible to effect reinstatement or promotion. *See* cases cited, *supra*, and *see also e.g., Chewning v. Seamans*, 28 FEP Cases 1735, 1740-41 (D.D.C. 1979) (a class member is entitled to front pay until he reaches his "rightful place."); *Stamps v. Detroit Edison Co.*, 30 FEP Cases 1805, 1813-14 (E.D. Mich. 1978) (front pay to continue until person discriminated against reaches her rightful position or its equivalent, or refuses opportunity for same); *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984) (front pay to continue until plaintiff is assigned to the position he was denied or a comparable one); *Parker v. Heckler*, 801 F.2d 709, 713 (4th Cir. 1986) (front pay to continue until plaintiff can be reinstated to "substantially equivalent" position); *Carter*

(...continued)
salary or benefits. Losses such as medical expenses, fees for therapy, and moving expenses are some examples.

v. Community Action Agency, 625 F.Supp. 199, 207 (M.D. Ala. 1985) (front pay awarded to a discharged employee where no comparable position was available); *Parker v. Siemens-Allis, Inc.*, 601 F.Supp. 1377, 1389 (E.D.Ark. 1985) (same); *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 822 (5th Cir. 1990) (front pay awarded in part because reinstatement would disrupt another employee).

However, other considerations have also prompted the courts to award front pay in lieu of reinstatement. For example, certain kinds of employment require a degree of trust and confidence that is irreparably damaged after a disputed termination followed by contentious litigation. In such circumstances common sense dictates that reinstatement is simply not feasible. *See e.g., EEOC v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1203 (2nd Cir. 1976).

Other courts have found, more generally, that reinstatement is inappropriate where there is evidence of "extreme animosity between the plaintiff and the defendant employer." In such circumstances, "although reinstatement would technically make the plaintiff whole, larger considerations of the relationship between the plaintiff and the employer, and, indeed, the environment in which their relationship is situated, militate against ordering reinstatement." *Webb v. District of Columbia*, 146 F.3d 964, 976-77 (D.C. Cir. 1998). *See also Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1066 (8th Cir. 1988) (front pay appropriate given "substantial animosity" between plaintiff and employer, where "relationship was not likely to improve, and the nature of the business required a high degree of mutual trust and con-

fidence"); *Spulak v. KMart Corp.*, 894 F.2d 1150, 1157-58 (10th Cir. 1990) (front pay awarded rather than reinstatement where employee was forced to retire having been humiliated in front of the employees he was supposed to supervise, and where antagonism between the parties was increased by "bitterly contested" litigation); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890 (3rd Cir. 1984) (front pay awarded at conclusion of acrimonious litigation for female employee who had held a sensitive position as a sales representative).

Some courts have also expressed a marked preference for front pay in order to avoid judicial responsibility for monitoring the success of a court-ordered reinstatement. *See e.g., Price v. Marshall Erdman & Associates, Inc.*, 966 F.2d 320, 325-6 (7th Cir. 1992):

> It is one thing to order the reinstatement of low-level employees performing routine tasks, or higher-level employees after the supervisors involved in the unlawful employment action have left the company or been transferred to another division. But to order reinstatement of a high-level employee performing discretionary functions into the division from which he was fired and which remains under the management of the person who fired him is a formula for continuous judicial intervention in the employment relation. . . . A federal district court is not equipped to be the labor relations equivalent of a domestic relations court. Reinstatement in the circumstances that we have described would be justified only if front pay could not be computed.

See also McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990) ("Courts of equity traditionally have refused to order specific performance of employment

contracts, because it is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment.").

Although *amici curiae* have not conducted a formal survey, they can say with considerable assurance that their members' clients involved in single-plaintiff claims of gender discrimination seldom seek or receive reinstatement as a remedy, for all the reasons recognized by the courts of appeals in the decisions just cited.[8] For these plaintiffs, the Sixth Circuit's construction will have a significant negative impact—one we submit was clearly not intended by the 1991 Act.

These circumstances are graphically illustrated in the instant case, where the evidence convincingly demonstrated both the need for front pay as an alternative to reinstatement and the propriety of an award of compensatory damages over and above the relief traditionally available under section 706(g) of Title VII. Sharon Pollard endured a prolonged—indeed seemingly interminable—period of gender-based discrimination and harassment. DuPont's own psychologist confirmed the psychological damage caused by the discrimination and harassment. She was ultimately fired when, having been on disability leave prompted by the effects of the discrimination and harassment, DuPont would only reinstate

---

[8] One commentator has suggested that the courts should relax the preference for reinstatement and recognize that front pay is more often the appropriate remedy. *See* Grebeldinger, *The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay*, 1996 U.Ill.L.Rev. 319 (1996).

her to the same position she had left and under the individual who had been her principal harasser. It is hard to imagine a more compelling case for an award of front pay: reinstatement would almost surely cause the plaintiff further injury, and it would be impossible to conclude that the working relationship would be anything but the most hostile. At the same time it is difficult to imagine a more compelling case for compensatory damages. Certainly the District Judge who tried the case without a jury found it compelling, awarding the full amount authorized by the 1991 Act.

The 1991 Act was enacted with cases like Mrs. Pollard's in mind. By its terms, it was intended to expand the monetary relief available to victims of employment discrimination. Back pay and reinstatement or front pay were found insufficient to compensate victims of discrimination for the injury "to their careers, [their] mental and emotional health, and [their] self-respect and dignity." *See* House Report No. 102-40(I) (1991) at 66. It is equally clear that Congress had no intention of limiting the relief that was already available under Title VII. The Sixth Circuit's reasoning turns this Congressional intent on its head. Victims of gross gender-based mistreatment like that visited on Mrs. Pollard can recover the full compensatory damages allowed, but are cut off from front pay, while a less harshly treated plaintiff can receive the compensatory damages allowed by the 1991 Act and return to her job. In other words, employees who are able to be reinstated can receive the full benefit of the augmented relief contained in the 1991 Act, while those who, because of the recalcitrance of their employer cannot be reinstated, will receive less.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge that the judgment below be reversed and the case remanded for consideration of an award of front pay.

Respectfully submitted,

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IN THE

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SHARON B. POLLARD,
Petitioner,

v.

E. I. DU PONT DE NEMOURS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council and the Chamber of Commerce of the United States respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of Respondent in this case. The written consent of Respondent E. I. Dupont de Nemours Company has been filed with the Clerk of the Court. Counsel for Petitioner Sharon B. Pollard has been asked but has not given consent.

In support of their motion, EEAC and the Chamber by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes nearly 350 of the nation's largest private sector corporations.

2. The Chamber of Commerce of the United States (the Chamber) is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country.

3. EEAC's and the Chamber's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC and the Chamber an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. Both EEAC's and the Chamber's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

4. All of EEAC's and many of the Chamber's members are employers covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and other workplace nondiscrimination laws.

5. As employers, and as potential defendants to employment discrimination claims asserted under these laws, EEAC's and the Chamber's members have a substantial interest in the issue presented in this case—*i.e.*, whether money awarded as "front pay" to a prevailing plaintiff under Title VII is subject to the caps the Civil Rights

Act of 1991 places on "[t]he sum of the amount of compensatory damages awarded under this section for *future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section . . . ." 42 U.S.C. § 1981a(b)(3) (emphasis added).

6. Because of their interest, EEAC and/or the Chamber have filed *amicus curiae* briefs in cases addressing this or related issues in several circuit courts of appeals. They also have participated in a number of other cases before this Court in which important public policy issues involving Title VII and the Civil Rights Act of 1991 were presented.

7. Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the Chamber of Commerce of the United States respectfully request that the Court grant them leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief *amici curiae*, contingent on the granting of the accompanying motion for leave.[1] The brief urges this Court to affirm the decision below and, thus, supports the position of the respondent, E.I. du Pont de Nemours Company.

[1] Counsel for the *amici curiae* authored the brief in its entirety. No person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound programs to end employment discrimination. Its membership now includes nearly 350 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. Its directors and officers include many of industry's leading experts on equal employment opportunity and affirmative action. Their combined experience gives EEAC valuable insight into the practical, as well as legal aspects of equal employment opportunity policies and practices.

The Chamber of Commerce of the United States (the Chamber) is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and other workplace nondiscrimination laws. As employers, and as potential defendants to claims asserted under these laws, EEAC's and the Chamber's members have a substantial interest in the issue presented in this case—*i.e.*, whether money awarded as "front pay" to a prevailing plaintiff under Title VII is subject to the caps the Civil Rights Act of 1991 places on "[t]he sum of the amount of compensatory damages

awarded under this section for *future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section . . . ." 42 U.S.C. § 1981a(b)(3) (emphasis added).

STATEMENT OF THE CASE

Sharon Pollard sued her former employer, E.I. du Pont de Nemours and Company (DuPont), alleging Title VII violations and state law torts. The district court dismissed her tort claims on summary judgment but, after a bench trial, found in Pollard's favor on the Title VII claims. The court awarded Pollard $107,364 in back pay and benefits, plus $300,000 in compensatory damages "in accordance with the statutory cap set forth in 42 U.S.C. § 1981a(b)(3)." *Pollard v. E.I. DuPont de Nemours*, 16 F. Supp.2d 913, 924 (W.D. Tenn. 1998).

The district court said in a footnote that its award of compensatory damages included "front pay" in accordance with Sixth Circuit precedent. *Id.* at 924 n.19. It went on to indicate that, but for the statutory cap, it would have awarded Pollard more than $300,000 in compensatory damages and also would have awarded punitive damages. *Id.* The court, however, did not specify what additional amounts it would have awarded.

On appeal, a three-judge panel of the Sixth Circuit reversed the summary judgment order and remanded the case for trial on one of Pollard's state law claims. Pet. App. 26a. In all other respects, it affirmed the judgment of the district court. *Id.* With regard to the effect of the $300,000 cap on damages, the panel followed the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), which held that front pay is subject to the cap because it is an element of "future pecuniary losses" within the meaning of 42 U.S.C. § 1981a(b)(3). Pet. App. 21a-22a. The panel indicated, however, that had it not been bound by *Hudson v. Reno*, it

would have followed decisions of other circuits that have held the statutory cap inapplicable to front pay. *Id.*

This Court granted certiorari to address the conflict in the lower courts' holdings regarding whether front pay is an element of "future pecuniary losses" covered by the caps on compensatory damages adopted in the Civil Rights Act of 1991.

SUMMARY OF ARGUMENT

In enacting the Civil Rights Act of 1991 (CRA-91), Congress fundamentally revamped the remedial scheme of Title VII. Departing from an employment law tradition begun more than half a century earlier in the National Labor Relations Act, Congress chose in CRA-91 no longer to limit Title VII remedies to measures designed to put an end to unlawful conduct and restore the *status quo ante*. Rather, for the first time in any federal statute dealing specifically with employment, Congress provided in CRA-91 for awards of compensatory and punitive damages.

The importation of these new, tort-style remedies into an employment statute marked a radical change in one of the core policies of federal employment law, and the damages provisions of CRA-91 were, to say the least, controversial. In the end, the controversy was surmounted in Congress only through a carefully crafted, bipartisan compromise. The essence of the compromise was to place specific dollar limits, or "caps," on the total amount of compensatory and punitive damages a successful complaining party could recover, ranging from $50,000 to $300,000 depending on the number of persons employed by the defendant-employer.

The drafters of the bill's damages provisions recognized that one of the keys to making this compromise work was to define precisely what the caps would, and would not, cover. In doing so, they chose words that draw a sharp line between past and future monetary losses. Thus, in a subsec-

tion entitled "Limitations," Congress specified that the caps would apply to, *inter alia*, damages awarded to compensate for "*future pecuniary losses.*" 42 U.S.C. § 1981a(b)(3) (emphasis added).

As the Sixth Circuit observed in *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997), the phrase "future pecuniary losses" plainly encompasses "front pay." Indeed, Congress scarcely could have chosen words more clearly descriptive of the type of losses for which front pay is designed to compensate.

This plain meaning of CRA-91's "Limitations" on damages is not negated or rendered ambiguous by the subsection that precedes it, which states that "[c]ompensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). For, although some courts had awarded front pay in Title VII cases prior to the 1991 amendments, as the Sixth Circuit correctly recognized, front pay was not expressly "authorized" by Section 706(g). *Hudson v. Reno*, 130 F.3d at 1203. Hence, Section 1981a(b)(2)'s general reference to other types of relief authorized under Section 706(g) of the 1964 Act is insufficient to shelter front pay from the effect of Section 1981a(b)(3)'s specific limitation on damages for "future pecuniary losses." Indeed, by expressly itemizing "backpay" and "interest on backpay" among the exclusions in § 1981a(b)(2), while making no mention of front pay, Congress made it all the more clear that it was capping all types of awards designed to compensate for *future* monetary losses, while allowing courts to continue the tradition of making victims whole for *past* monetary losses.

ARGUMENT

THE PLAIN LANGUAGE OF 42 U.S.C. § 1981a(b)(3) LIMITING DAMAGES FOR "FUTURE PECUNIARY LOSSES" CLEARLY PLACES FRONT PAY SQUARELY UNDER THE STATUTORY CAPS.

I. The Damages Provisions of the Civil Rights Act of 1991 Were the Result of a Carefully Crafted Compromise in Which Congress Placed Caps on Damages for *Future* Monetary Losses, While Allowing Courts To Continue the Tradition of Making Victims Whole for Specific, *Past* Losses.

A. The Amendment Making Compensatory and Punitive Damages Available under Title VII Marked a Departure from a Longstanding Employment-Law Tradition of Limiting Remedies to Injunctive and "Make Whole" Relief.

Until it enacted the Civil Rights Act of 1991, Congress consistently had limited the remedies available under federal employment laws to measures designed to put a stop to unlawful conduct and make victims whole through reinstatement, backpay, and similar measures. Never before in a statute dealing specifically with employment had Congress provided for tort-style awards of general damages not tied to any specific economic losses.

This tradition of limited, preventative and restorative relief began in 1935 under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, the nation's first comprehensive statute regulating workplace conditions. *See NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) (Reflecting NLRA's objectives, remedies afforded to victims of discrimination under NLRA are designed to reconstruct situation that would have existed had unlawful activity not occurred); *Virginia Electric & Power Co. v.* NLRB, 319 U.S.

533, 540 (1943) (NLRB is authorized to issue orders that restore *status quo ante*, either by divesting wrongdoer of benefits obtained from unfair labor practice or placing parties in positions they would have been in had illegal conduct not occurred); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938) ("The power [of the NLRB] to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."). Thus, Congress did not authorize awards of general compensatory damages or punitive damages under the NLRA. *Id.* at 235-36.

Congress adhered to this tradition of limited remedies in 1938, when it enacted the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* It provided that an employer who violates that law's minimum wage or overtime pay requirements can be ordered to pay employees "the amount of their unpaid minimum wages, or their unpaid overtime compensation" up to a maximum of two years. In cases of willful violations, the recovery period is extended to three years, and "an additional equal amount' may be awarded as "liquidated damages." 29 U.S.C. § 216. The FLSA also provides for injunctive relief. 29 U.S.C. § 217. But, like the NLRA, it does not provide for awards of compensatory or punitive damages.

In 1963, Congress took the same approach when it enacted the first federal statute banning a form of employment discrimination based on sex—the Equal Pay Act (EPA), 29 U.S.C. § 206(d). Congress made the EPA an amendment to the FLSA and simply incorporated that law's remedial scheme calling for payment of lost wage wages for a maximum of two years, or three years plus "liquidated damages" in cases of willful violation.

In keeping with this federal policy, the following year, when it enacted the Civil Rights Act of 1964, Congress

modeled that law's provisions dealing with remedies for victims of employment discrimination after "the backpay provision of the [NLRA]" and thus provided only injunctive and "make whole" remedies. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 and n.11 (1975) ("The framers of Title VII stated that they were using the NLRA provision as a model."); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976) (describing NLRA as "the model" for Title VII's remedies provision). Thus, Section 706(g) of Title VII permits a court, upon finding intentional discrimination, to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). Backpay under Title VII may not accrue from more than two years before the filing of a charge of discrimination. *Id.*

In 1967, when it enacted the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, Congress incorporated by reference the enforcement provisions of the FLSA, including that law's limited provisions for back pay, plus "liquidated damages" in cases of willful violations. 29 U.S.C. § 626(b). It has long been recognized that the monetary remedies available under the ADEA do not include compensatory or punitive damages. *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146-48 (2d Cir. 1984) (no compensatory or punitive damages under ADEA). *Accord: Perrell v. FinanceAmerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984); *Naton v. Bank of California*, 649 F.2d 691, 698-99 (9th Cir. 1981); *Slatin v. Stanford Research Institute*, 590 F.2d 1292, 1293-96 (4th Cir. 1979); *Rogers v. Exxon Research and Eng. Co.*, 550 F.2d 834, 841-42 (3d Cir. 1977).

In 1972, when it first amended Title VII, Congress "strongly reaffirmed the 'make-whole purpose' of [that statute]." *Albemarle Paper Co. v. Moody*, 422 U.S. at 421.

The section-by-section analysis accompanying the Conference Committee Report states:

> In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 Cong. Rec. 7168 (1972).

In 1978, when it again amended Title VII to clarify that discrimination on the basis of sex includes discrimination on the basis of "pregnancy, childbirth or related medical conditions," 42 U.S.C. § 2000e(k), Congress did not change the remedies provided by the statute, but retained the existing "make-whole" remedies.

Other labor and employment laws enacted prior to 1991 also reflect this consistent federal policy of limiting relief to preventative and restorative remedies. Thus, the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*; the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*; the Davis-Bacon Act, 40 U.S.C. § 276a; the Service Contract Act, 41 U.S.C. § 351 *et seq.*; the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*; and the employment-related provisions of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b, all provide for "make-whole" remedies, but not for tort-style damages.

Even as recently as 1990, Congress continued this tradition when it enacted the Americans with Disabilities Act. 42 U.S.C. § 12101 *et seq.* As originally introduced in the

Senate, the employment discrimination provisions of that legislation would have provided a plethora of remedies, including compensatory and punitive damages. As ultimately passed, however, it incorporated by reference the remedies and procedures of Title VII, thus reflecting the congressional preference for injunctive and "make whole" remedies. Senator Durenberger explained the reasons for the change:

> [W]e also took great effort to address the concerns many had over the punitive nature of the remedies section. Instead of allowing punitive and compensatory damages as originally introduced, the bill before us today parallels current civil rights legislation under [T]itle II and VII of the Civil Rights Act of 1964. . . . This change will help avoid some of the excessive and unnecessary litigation the original bill would have caused.

135 Cong. Rec. S10721 (Sept. 7, 1989) (statement of Sen. Durenberger).

Prior to 1991, the only exception to the general rule that federal employment-law remedies were limited to preventative and restorative measures was found in cases decided under the Civil Rights Act of 1866, 42 U.S.C. § 1981, commonly known as Section 1981. That law, which guarantees all persons in the United States the same right as "white citizens" to make and enforce contracts, relies for its enforcement on direct resort to civil litigation and places no limitation on the remedies a court may award. Section 1981, however, was not enacted specifically as an employment law. Indeed, its applicability to employment discrimination in the private sector was not established until more than 100 years after its enactment, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

B. To Achieve the Compromise That Secured Passage of the Legislation, the Drafters of the Civil Rights Act of 1991 Chose Their Words Carefully, Capping Damages for "Future Pecuniary Losses" But Not Placing Any New Restrictions on Backpay or Interest on Backpay.

During the congressional debates on CRA-91, proponents of expanding Title VII's remedies argued that then-existing law created a lack of "parity," in that victims of intentional discrimination on the basis of race or national origin could sue under Section 1981 and recover compensatory and punitive damages, while victims of intentional discrimination or harassment on the basis of sex or religion could sue only under Title VII and receive only injunctive and make-whole relief. *E.g.*, H.R. Rep. No. 102-40, pt. 1, at 65 (1st Sess. 1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603. Opponents responded vigorously:

> The fallacy with this argument is that section 1981 is not an employment statute at all. Rather, the section is a broad civil rights statute passed by Congress shortly after the Civil War to prevent racial discrimination in the making and enforcement of contracts. It has been applied to numerous factual situations, including jury service, voting rights, access to country clubs, admissions to schools and hospitals, automobile franchises, licensing requirements, and rental housing. Indeed, it was not until the early 1970s, a hundred years after enactment, that the courts judicially decided that the law even applied to private-sector employment discrimination. [Footnote omitted]. The law's proper applicability to employment discrimination has, thus, never been thoroughly considered by Congress. More importantly, its remedies as applied to employment discrimination are clearly an anomaly in the field of employment law and represent a small divergency, basically judicially created, from a long-standing Congressional pattern.

> In sum, proponents have found one judicially crafted exception to a rule established under many labor statutes and have asserted that this exception should now be the rule, or, put another way, that "yes, indeed, the tail should wag the dog." This hardly seems to be compelling logic. [Footnote omitted].

H.R. Rep. No. 102-40, pt. 1, at 146-147 (1st Sess. 1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 675-76 (Minority Views). Opponents also argued that expanding Title VII's remedies to include compensatory and punitive damages would generate a flood of costly litigation, make the conciliation procedures of the Equal Employment Opportunity Commission a virtual "irrelevancy," and impose onerous burdens, particularly on smaller employers. *Id.* at 147-153, *reprinted in* 1991 U.S.C.C.A.N. 549, 676-82.

In the end, the issue was resolved through a carefully crafted legislative compromise, whereby Congress replaced Title VII's remedial structure with a unique scheme that followed neither the traditional employment-law pattern of limiting relief exclusively to preventative and restorative measures nor the civil tort pattern of leaving it to the courts to determine without any limitation the amount damages to be awarded. The compromise consisted of making compensatory and punitive damages available under certain conditions,[2] but placing "caps" on the total amount of such damages any complaining party could receive.[3]

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[2] Compensatory and punitive damages are available only in cases of intentional discrimination. 42 U.S.C. § 1981a(a)(1). Punitive damages are subject to the additional requirement that the complaining party demonstrate that the respondent acted with "malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). *See Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

[3] The "caps" range from $50,000 to $300,000, depending on how many employees the defendant employer has. For firms with 500 or more

A key element of this compromise was the adoption of statutory language that clearly delineated the kinds of monetary relief that would be subject to the caps, and those that would not. For that purpose, Congress chose words that draw a sharp line between *past* and *future* monetary (or "pecuniary") losses. It provided in 42 U.S.C. § 1981a(b)(2) that the caps would not apply to "*backpay*, *interest* on backpay, or any other type of relief authorized under section 706(g) of [Title VII]." (emphasis added). On the other hand, it specified in 42 U.S.C. § 1981a(b)(3) that the caps would apply to damages awarded for "*future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. . . ." (emphasis added).

Thus, under the compromise finally reflected in CRA-91, Congress preserved the availability of the traditional employment-law remedies of backpay and interest on backpay. At the same time, it authorized courts to award limited compensatory and punitive damages. To avoid opening the door to the unrestricted liabilities feared by opponents of previous versions of the legislation, however, Congress placed caps on the amount any one complaining party could be awarded as compensatory and/or punitive damages, and it made clear that those caps apply to damages for inherently speculative harm such as "future pecuniary losses," as well as for inherently subjective harm such as pain and suffering.

C. The Statutory Phrase "Future Pecuniary Losses" Clearly Describes the Type of Losses for Which Front Pay Is Designed To Compensate.

As the Sixth Circuit correctly recognized, the ordinary meaning of the phrase "future pecuniary losses" plainly encompasses money awarded as "front pay"—*i.e.*, as "a

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employees, such as the Respondent in this case, the maximum cap applies. 42 U.S.C. § 1981a(b)(3).

monetary award for the salary that the employee would have received but for the discrimination." *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997). Indeed, it is hard to conceive of a phrase more aptly descriptive of the type of loss for which front pay is intended to compensate.

Front pay has been used in employment cases as a substitute for an order directing an employer to reinstate an individual to the position he or she would have held in the absence of unlawful discrimination. Reinstatement is the strongly preferred remedy. *E.g.*, *Selgas v. American Airlines, Inc.*, 104 F.3d 9, 13 (1st Cir. 1997) (stating that "overarching preference" is for reinstatement); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1103 (3d Cir. 1995) (stating that reinstatement "is the preferred remedy to avoid future lost earnings") (quoting *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985)); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991) (noting "strong preference in favor of reinstatement"); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987) (referring to reinstatement as the "preferred remedy"). Nevertheless, when circumstances make instatement or reinstatement infeasible or impracticable, courts have sometimes awarded front pay, in effect to take the place of the wages it is estimated the individual would have received had reinstatement taken place. *E.g.*, *Cowan v. Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998) (front pay appropriate where reinstatement would present extreme burden); *Selgas*, 104 F.3d at 13 (front pay appropriate as "alternative" for periods in which reinstatement is unavailable); *Starceski*, 54 F.3d at 1103 (front pay appropriate where reinstatement is not feasible); *Cassino*, 817 F.2d at 1346 (same).

Unlike backpay, front pay is not specifically authorized under Title VII. Moreover, although Title VII precludes accrual of backpay from a date more than two years prior to the filing of a charge with the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-5(g)(1), the

statute places no comparable time limit on the accrual of front pay. Thus, while backpay and interest thereon represent compensation for specifically ascertainable, finite losses sustained prior to the award of the remedy, front pay is quite different. Front pay, by its very nature, is a more open-ended and speculative remedy. It is more in the nature of general damages to compensate for the estimated value of an anticipated future loss.

Given these substantial differences in the nature of the two remedies, it is entirely understandable and appropriate that Congress chose to treat backpay and front pay—*i.e.*, remedies for *past* monetary losses and for *future* monetary losses, respectively—differently when it revamped the remedial structure of Title VII in 1991. When it elected, for the first time in any federal employment statute, to make limited compensatory damages available in CRA-91, it made perfect sense for Congress to place caps, as it did, on inherently open-ended damages, including "future pecuniary losses" such as front pay, as well as items such as pain and suffering, while leaving unchanged the traditional employment law remedies of backpay and interest.

II. The Plain Meaning of Section 1981a(b)(3)'s Limitation on Damages for "Future Pecuniary Losses" Is Not Negated or Rendered Ambiguous by Section 1981a(b)(2)'s Exclusion of "Relief Authorized Under Section 706(g)" of Title VII.

A. The *Specific* Language in Section 1981a(b)(3) Subjecting Damages for "Future Pecuniary Losses" to Statutory Caps Controls Over the *General* Language of Section 1981a(b)(2) Excluding "Other Relief Authorized under Section 706(g)" from Compensatory Damages.

As demonstrated above, because the phrase "future pecuniary losses" clearly encompasses the type of monetary losses for which front pay awards are designed to

compensate, the plain meaning of Section 1981a(b)(3) places front pay squarely under CRA-91's caps on damages. This plain meaning is not altered or rendered ambiguous by the preceding subsection of CRA-91, which states that "[c]ompensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). For, as the Sixth Circuit correctly recognized, Section 706(g) of Title VII never has specifically authorized front pay. *Hudson v. Reno*, 130 F.3d at 1203. On the contrary, Section 706(g) specifically authorizes *backpay*, subject to certain limitations, but makes no mention whatsoever of *front pay*.

To be sure, courts sometimes have awarded front pay in Title VII cases in reliance on the general provision of Section 706(g) stating that, upon finding an unlawful employment practice, a court may order reinstatement, with or without back pay, "or any other equitable relief as the court deems appropriate." But under established rules of statutory construction, Section 1981a(b)(2)'s reference to this *general* language of Section 706(g) cannot negate the effect of Section 1981a(b)(3)'s *specific* language subjecting damages for "future pecuniary losses" to the statutory caps. 2A Norman J. Singer, Sutherland Statutes and Statutory Construction 177-178 (6th ed. 2000 & Supp. 2001) ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.") (footnote omitted). Thus, it is not necessary for the Court to decide in this case whether or not Section 706(g), in fact, authorizes courts to award front pay in Title VII cases. For, even assuming that it does, the authorization is only in broad, *general* statutory language, which must give way to the *specific* language of Section 1981a(b)(3) when it comes to determining the applicability of that subsection's caps to damages for "future pecuniary losses," such as front pay.

This conclusion is further reinforced by the corollary maxim that "the last provision in point of arrangement within the text of [the same statute] is given effect" over contrary, preceding provisions. 2A Norman J. Singer, Sutherland Statutes and Statutory Construction 179 (6th ed. 2000 & Supp. 2001) (footnote omitted). In 42 U.S.C. § 1981a, the general provision of subsection (b)(2) that excludes from compensatory damages "any other type of relief authorized under section 706(g)" *precedes*, and therefore must give way to, the more specific provision of subsection (b)(3) that places caps on damages for "future pecuniary losses" such as front pay. Hence, (b)(3) is controlling, and the caps apply.

B. Under the Maxim of *Expressio Unius Est Exclusio Alterius*, the Express Inclusion in Section 1981a(b)(2) of References to "Backpay" and "Interest on Backpay" Effectively Excludes Front Pay from That Section.

A final confirmation that the general language of Section 1981a(b)(2)'s exclusions from compensatory damages do not remove front pay from the effect of the caps contained in Section 1981a(b)(3) is found in another familiar maxim of statutory construction: *Expressio unius est exclusio alterius—i.e.*, to mention one thing expressly in a statute is to exclude other things, not mentioned. 2A Norman J. Singer, Sutherland Statutes and Statutory Construction 304 (6th ed. 2000 & Supp. 2001). In setting forth "exclusions from compensatory damages" in subsection (b)(2), Congress expressly mentioned "backpay" and "interest on backpay," but made no mention of front pay. Hence, by application of the maxim, forms of monetary relief other than backpay and interest on backpay are excluded from the "exclusions," and consequently are subject to the statutory caps. Thus, this settled rule of statutory construction also leads inexorably to the conclusion that front pay under Title VII is capped at a maximum of $300,000.

CONCLUSION

For the reasons discussed above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

—v.—

E.I. DUPONT DE NEMOURS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Society for Human Resource Management ("SHRM") is the leading voice of the human resource profession. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 150,000 professional and student members throughout the world. As the world's largest human resource management association, SHRM is a founding member of the North American Human Resource Management Association and a founding member and Secretariat of the World Federation of Personnel Management Associations.

As the major association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of non-discrimination and equal employment opportunity and the nature and scope of remedies available under that law, as well as an employer's obligation to provide a workplace free from discrimination. SHRM has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems.

With respect to this case, SHRM's interest — like Congress's interest in imposing caps on damages available to plaintiffs under federal anti-discrimination laws such as Title VII — is to support rules that strike an appropriate and

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

judicious balance between, on the one hand, providing enhanced and diverse forms of remedies to legitimate victims of discrimination and, on the other hand, protecting businesses from exposure to potentially devastating liability which may irreparably injure not only the business, but also the employees of the business that rely on its continued viability for their livelihood.

SUMMARY OF ARGUMENT

With the passage of the Civil Rights Act of 1991 (the "1991 Act"), Congress authorized compensatory and punitive damages for intentional discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). At the same time, the statute capped available damages at various levels depending on the size of the employer. The plain statutory language of the 1991 Act, confirmed by its legislative history, reflects this congressional intent to expand the types of remedies available under Title VII, but limit the exposure of businesses — and particularly small businesses. Limiting exposure to such damages was in fact critical to passage of the 1991 Act. As explained below, this congressional intent — plainly reflected in the text of the 1991 Act — is undermined if front pay damages are exempted from this statutory cap.

The texts of both Title VII and the 1991 Act themselves compel the conclusion that front pay damages should be included within the statutory cap on damages. Title VII does not expressly authorize front pay (as it does back pay). The 1991 Act similarly does not mention front pay, but provides for awards of compensatory damages, which include damages for "future pecuniary losses" other than back pay and other relief that was already authorized by Title VII. If the terms "future pecuniary losses" are given their ordinary, contemporary and common meaning, such losses must include damages for future lost earnings, *i.e.*, front pay. As such, front pay falls within the

definition of the types of damages that are subject to the statutory cap (*i.e.*, "future pecuniary losses"), and are not excluded from the caps because front pay was not a remedy specifically authorized by the text of Title VII.

Although many courts have continued to exclude front pay from the damages caps, in *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997), *cert. denied*, 525 U.S. 822 (1998), the Sixth Circuit Court of Appeals found that front pay damages are included within the caps. The *Hudson* court reasoned that, because front pay — or monetary compensation for future lost earnings — was not expressly authorized by Title VII, it fit squarely within compensatory damages for "future pecuniary losses." The reasoning of the Sixth Circuit reflects the plain meaning of the statutory language crafted by Congress.

Characterizing front pay as an equitable remedy, and not a legal one, because courts have on occasion awarded it in lieu of the equitable remedy of reinstatement, cannot be determinative because Title VII does not specifically authorize front pay, and compensation for future lost earnings has always been, historically, a classic form of monetary relief routinely awarded by juries in diverse types of cases. The fact that courts have used this legal remedy as a substitute for the equitable remedy of reinstatement when that remedy is, as a practical matter, unavailable (and even have referred to it as "equitable" because it is substituted for an equitable remedy), does not change the fundamental nature of the relief, which is legal, or transform it into something other than compensation for "future pecuniary losses" that are subject to the cap on damages in the 1991 Act.

Finally, capping front pay best effectuates the goals of the 1991 Act. It allows legitimate victims of discrimination access to forms of relief such as emotional distress, punitive damages, and compensation for lost future earnings, while at

the same time (by virtue of the statutory caps on those remedies) discourages frivolous, costly litigation, and limits, in a reasonable manner, the exposure of businesses — particularly small businesses — to unbridled damage awards. Exempting front pay from the statutory caps on damages established by the 1991 Act would entirely undermine this statutory goal.

Argument

Point I

Front Pay Is Compensation For Future Pecuniary Loss Subject to The Cap on Compensatory And Punitive Damages Pursuant to 42 U.s.c. § 1981a

A. The Civil Rights Act of 1991 Struck A Balance Between Expanding Remedies for Victims of Discrimination, and Protecting Small Businesses from Exposure to Oppressive Damages Awards

Prior to the passage of the Civil Rights Act of 1991, 42 U.S.C. § 1981a ("the 1991 Act"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") only permitted a court, as a remedy for a violation of the statute, to:

> enjoin the respondent from engaging in such unlawful practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other appropriate equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). The statute did not provide for monetary relief other than back pay, and did not explicitly authorize an award of front pay or otherwise address compensation for future damages.

In passing the 1991 Act, Congress expressly authorized courts to award pecuniary relief for violations of Title VII in the form of punitive damages for intentional discrimination, and "compensatory damages." 42 U.S.C. § 1981a(a)(1) The 1991 Act did not define "compensatory damages" other than to expressly exclude from such damages "back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). As this Court recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 (1994), "the new compensatory damages provision [in] the 1991 Act is 'in addition to,' and does not replace or duplicate the *backpay* remedy allowed under prior law." (emphasis added). In that decision, this Court also recognized that the 1991 Act "significantly expands" the monetary relief available to plaintiffs which before generally "included 'only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits . . . ,'" *i.e.* back pay. *Id.* at 253 (citing *United States v. Burke*, 504 U.S. 229, 239 (1992)).

In contrast to the express exclusion of back pay from the definition of "compensatory damages," the 1991 Act does not mention front pay as a form of relief excluded from compensatory damages. The statute easily could have been drafted to include such an exclusion.

Although the 1991 Act significantly expanded the monetary relief available to plaintiffs in Title VII actions, it also established "caps" on that relief, limiting "the amount of compensatory damages for future pecuniary losses . . . and the amount of punitive damages" on a sliding scale based on company size. 42 U.S.C. § 1981a(b)(3). Damages for employers with more than 14 and fewer than 101 employees are capped at $50,000; for employers with more than 101 but fewer than 200 employees, damages are capped at $100,000; for

employers with more than 200 but fewer than 501 employees, the cap is $200,000; and for employers with more than 500 employees, the cap is $300,000. *Id.*

The legislative history of the 1991 Act demonstrates that these caps were included in the legislation as part of a compromise that struck a balance between, on the one hand, significantly expanding the nature and extent of the remedies available to victims of discrimination and, on the other hand, reasonably limiting the exposure of businesses, especially small businesses, to frivolous litigation (encouraged by the availability of new damages), and potentially devastating damage awards. As explained on the floor of the Senate by Senator Dole, "Throughout the negotiations [on the compromise necessary to pass the 1991 Act], the administration had two main objectives," to ensure that employers would not be forced to resort to quotas and "to ensure that *all* damage remedies were reasonably capped. On both counts, the administration has succeeded." 137 Cong. Rec. S 15472 (Oct. 30, 1991) (emphasis added).

Dole further stated that this compromise "makes compensatory and punitive damages available for this first time in cases involving intentional discrimination . . . ," and that, "[t]hese damages are capped, setting an important precedent for tort reform." Moreover, "[w]ith these caps, the incentive for frivolous lawsuits should be significantly reduced." *Id.*

Dole then introduced a section-by-section analysis "representing the views of the administration," and several other Senators, which explains, in pertinent part, that the cap provision "sets an important precedent in tort reform by setting caps on those damages, including pecuniary losses that have not yet occurred. . . ." *Id.* at S15473.

Senators Bumpers and Kasten similarly explained that one of the principal rationales for the cap provision was the

potential effect of large damage awards on businesses, particularly the small businesses that make up the vast majority of employers. *See* 137 Cong. Rec. S15472, at *S15478-80 (explaining how the cap provision was necessary to their support of the bill because it would allow for deterrence of discrimination yet not facilitate entangling small business in endless litigation).

Accordingly, an essential characteristic of the 1991 Act, reflected in its language and supported by its legislative history, is this balance struck between expanding and enhancing available remedies to legitimate victims of discrimination, and limiting, in a reasonable and rational manner, the exposure of modest businesses that could otherwise be subjected to frivolous yet costly litigation, and unlimited exposure to potentially crippling damage awards.

B. The plain meaning of the 1991 Act requires that front pay is included as an element of "future pecuniary losses" subject to the cap on compensatory and punitive damages in 42 U.S.C. § 1981a (b)(3)

It is a "fundamental canon of statutory construction []that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citations omitted); *see also Williams v. Taylor*, 529 U.S. 420, 427 (2000) (absent an indication that Congress intended otherwise, "a statute's words must be given their ordinary, everyday meaning); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.");

The language of section 1981a, when given its ordinary, contemporary and common meaning, is, as Petitioner claims, "largely dispositive of the question in this case," [Pet. Br. 17],

but compels the opposite result from that asserted by Petitioner. According to Webster's Dictionary, the terms "future," "pecuniary" and "loss" are defined as follows:

> Future - "existing or occurring at a later time"
>
> Pecuniary - "consisting of or measured in money"
>
> Loss - "a person, thing or amount that is lost; a decrease in amount, measurement or degree"

Webster's New Collegiate Dictionary (10th Ed. 1998).

Consistent with the definitions of these common terms, front pay is plainly a form of "future pecuniary loss": it is compensation for an amount that will be "lost" "at a later time," and the amount "consists" of, and is "measured in" money.

Indeed, "front pay" awarded to compensate victims for damages that have not yet accrued at the time of judgment, is generally defined as future lost earnings, simply another way of saying future pecuniary losses. *See United States v.Burke*, 504 U.S. 229, 236 n.9 (1992) (recognizing, in a footnote, that some courts have allowed Title VII plaintiffs to recover "front pay" or future lost earnings); *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000) (affirming jury award of front pay, finding that back pay is similar to lost wages in tort and "front pay is like lost future income"); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997 (10th Cir. 1994) ("Front pay refers to the award of money for the future loss of earnings") (citing *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir.), *cert. denied,* 493 U.S. 842 (1989); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 44 (5th Cir. 19920 ("Front pay is awarded to compensate the plaintiff for future lost wages and benefits").

As the Sixth Circuit held in *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997), *cert. denied,* 525 U.S. 822 (1998), absent any definition specified in the statute, a court's

responsibility is to give the phrase "future pecuniary losses" its "ordinary, contemporary, common meaning" (*citing Perrin* , 444 U.S. at 42). As the *Hudson* court found, front pay, which is a monetary award for future loss of wages or other benefits that the plaintiff would have received, fits squarely within the common, ordinary definition of future pecuniary loss. *Hudson* at 1203 (citing *Shore v. Fed. Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994)). As that court explained, "front pay has always been the heart of 'future pecuniary losses' in discrimination suits." *Hudson at* 1204.

Because it is clear on the face of the 1991 Act that the phrase "future pecuniary losses" — if given its common and ordinary meaning — must include front pay, and "future pecuniary losses" are subject to the caps on damages (and there is no express exclusion of front pay from the cap), this Court need proceed no further in its analysis. The plain text of the statute compels the conclusion that front pay is subject to the statutory caps on damages.

Petitioner's principal argument is that front pay is not subject to the caps on compensatory damages for future pecuniary losses because, prior to the 1991 Act, courts frequently awarded front pay as a remedy in Title VII cases in lieu of reinstatement. [Pet. Br. 17]. According to Petitioner, this necessarily renders front pay equitable in nature, and authorized by Title VII. [Pet. Br. 23]

The flaw in Petitioner's reasoning is that Title VII, prior to the 1991 Act, did not on its face authorize front pay, as it did back pay. Rather, front pay is a judicially recognized remedy that courts fashioned for those circumstances where reinstatement was not a viable equitable remedy. *See, e.g., Hudson,* 130 F.3d at 1201-03 (stating front pay is not "specifically authorized by § 706(g)," but recognizing that although reinstatement is the presumptively favored equitable

remedy, prior to the enactment of the 1991 Act courts awarded front pay as an alternative where reinstatement was not appropriate); *EEOC v. W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000) (finding claimants are presumptively entitled to reinstatement, but that front pay can be awarded when a hostile or otherwise unsuitable environment counsels against reinstatement).

Regardless of whether courts have properly recognized a front pay remedy in those situations where equitable relief, such as reinstatement, is not available as a practical matter (an issue that is not before this Court),[2] recognizing the remedy of front pay does not render that remedy something other than compensation for "future pecuniary losses" as those terms are ordinarily understood. Because (i) the 1991 Act plainly, on its face, caps compensatory damages, which, by definition, explicitly include damages for "future pecuniary losses"; (ii) Title VII has never expressly authorized the legal remedy of compensation for future pecuniary losses such as front pay; and (iii) if the statutory language of the 1991 Act is given its ordinary and customary meaning, then front pay can only be considered a form of "future pecuniary losses," front pay must — as a matter of basic statutory construction — be subject to the statutory caps on damages established in the 1991 Act.

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[2] As explained below, at least one Circuit Court of Appeals has questioned the propriety of awarding front pay under a statute that nowhere mentions the availability of that remedy, but speaks entirely in terms of back pay and equitable remedies. *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 116-17 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

C. Front Pay is Not "Equitable Relief" and is Therefore Not Excluded From the Caps on Compensatory Damages

Petitioner uses circular reasoning to reach the conclusion that front pay is equitable relief excluded from the caps on compensatory damages for future pecuniary losses. In short, Petitioner argues that (i) although 706(g) does not expressly authorize front pay, it does authorize equitable relief; (ii) courts have routinely granted front pay in lieu of the equitable remedy of reinstatement; (iii) *ergo* front pay is not compensatory relief, but equitable relief authorized by 706(g), because it has been used as a substitute for an equitable remedy. [Pet. Br. 22-23] This argument is flawed because it rests on the mistaken premise that a legal remedy that a court may substitute for an unavailable equitable one, somehow transforms the legal remedy into an equitable one. It also ignores the established case authority that holds that an award of damages for future lost earnings is a legal remedy.

Like any other form of damages, compensation for future lost earnings or wages, the definition of front pay, is a classic form of legal, not equitable, relief. *See, e.g. Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000) (affirming jury award of front pay in a claim under the Americans with Disabilities Act, finding that front pay is like lost future income, and that "[j]uries routinely determine lost wages and discount future income loss to present value"); *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 982 F. Supp. 786 (W.D. Wash. 1997) (affirming jury award for front pay in state and federal discrimination action), *aff'd, in part, and vacated in part, and remanded*, 212 F.3d 493 (9th Cir. 2000)); *Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 647 (N.D. Ala 1989) (finding that it is "disingenuous to call 'front pay' an equitable remedy. . . The loss of future earnings constitutes damages of the kind today regularly and

routinely submitted to a jury for resolution in other kinds of cases.").

Indeed, at the common law, employment contracts often contained provisions for both back pay and front pay. Front pay was considered legal relief, and awarding front pay damages was within the purview of the jury precisely because it was legal in nature. *See, e.g., Hollwedel v. Duffy-Mott Co.*, 238 A.D. 468, 264 N.Y.S. 745 (App. Div.) (measure of damages in wrongful discharge included damages for wages accruing after the breach which plaintiff, in opinion of jury, would have lived to earn), *modified*, 263 N.Y. 95 (1933); *see also Barter v. Columbia Farms Distrib. Inc.*, 912 F. Supp. 16 (D. Mass. 1996) ("reducing jury verdict, but noting that measure of damages included what plaintiff would have earned if he had remained in defendant's employ after breach of plaintiff's employment contract.").

Granting legal relief as a substitute for an equitable remedy that is not available as a practical matter, does not somehow magically change the nature of that legal relief, or render it equitable, simply because it is being awarded in lieu of an unavailable equitable remedy. Rather, judicially crafted *legal* relief is simply being substituted for statutorily provided, but practically unavailable, *equitable* relief. Accordingly, although prior to the 1991 Act, courts fashioned the remedy of front pay in an effort to reconcile the "make whole" objectives of Title VII with the fact that in some cases the equitable remedy of reinstatement may not be available, and labeled the relief "equitable" because it substituted for statutorily prescribed equitable relief, they did so by utilizing a remedy that historically was a legal remedy. In short, using front pay as a substitute for reinstatement does not change its legal nature merely because "it is offered in lieu of an equitable remedy." *See* Lisa von der Mehden, *The Role of the Jury and the Court*

in Assessing Front Pay Awards under The Age Discrimination in Employment Act, 58 U. Chi. L. Rev. 1475, 1490-92 (1991).

Indeed, some courts have questioned whether recognizing the legal remedy of front pay was appropriate, notwithstanding its salutary purposes, precisely because front pay is a legal, and not an equitable, remedy. As Judge Posner, writing for the court, noted in *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 116-17 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991):

> The logic of awarding front pay, if the purpose of Title VII's remedial scheme is indeed to make the plaintiff whole, is undeniable. But the premise can be doubted, as can the propriety, under a statute confined to equitable relief, of an award of what is realistically damages for lost future earnings — a legal rather than an equitable remedy.[3]

In sum, the fact that courts — correctly or incorrectly — have exercised their discretionary powers, prior to the availability of compensatory damages, to award a legal remedy (front pay) when an equitable remedy (reinstatement) was not available, does not transform that remedy into equitable relief. Because only equitable relief that is authorized by Title VII is exempt from the caps on compensatory damages, the legal remedy of front pay is necessarily subject to the caps because it is neither equitable relief, nor relief specifically authorized by the text of Title VII.

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[3] In this respect, Title VII is distinct from the Age Discrimination in Employment Act (the "ADEA"), which allows courts to award such "*legal* or equitable relief as may be appropriate to effectuate the purposes" of that Act. 29 U.S.C. § *626*(b) (emphasis added).

POINT II

CAPPING DAMAGES FOR FRONT PAY EFFECTUATES THE GOALS OF THE 1991 ACT

As explained above, although the goals of the 1991 Act were undoubtedly to expand the types of remedies available under Title VII, both to ensure that victims of intentional discrimination were made whole and to provide adequate deterrence, the statute at the same time reflects in its text an intent to provide some measure of protection to businesses from frivolous lawsuits, as well as from excessive awards. The caps on compensatory and punitive damages were intended by Congress to strike the appropriate balance between these competing interests.[4] Allowing uncapped front pay awards would substantially undermine this statutory intent. Large front pay damages awards would have the same deleterious effect that Congress intended to avoid by capping awards for compensatory and punitive damages.

Front pay is "widely defined as the salary a plaintiff would have received had he or she not been subjected to unlawful discrimination of his employer, subject to the employee's mitigating his or her damages." *Shore v. Fed. Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994). By its nature, front pay is speculative, and the longer the period it covers, the more speculative it is. *McKnight v. Gen. Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993); *Burns v. Texas City Refining*, 890 F.2d 747 (5th Cir. 1989). It is also intended to be temporary, to insure

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[4] Despite a detailed examination of the legislative history of the 1991 Act, Petitioner is silent with respect to the legislative history of the cap provision itself, which, as explained above, was undeniably a compromise measure that allowed the bill to pass.

that a person is made whole, and "not to guarantee every claimant who cannot mitigate damages by finding comparable work an annuity [to retirement age]." *Anastascio v. Schering Corp.*, 838 F.2d 701, 709 (3d Cir. 1988).

Despite the fact that front pay is acknowledged by courts to be speculative and only temporary in nature, courts have awarded front pay damages ranging from short periods of time to decades, and awards of front pay for more than ten years are not uncommon. *See, e.g. Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125-26 (2d Cir. 1996) (upholding award of twenty-three years of front pay), *cert. denied*, 520 U.S. 1274 (1997); *Martini v. Fed. Nat'l Mortgage* Ass'n., 178 F.3d. 1336 (D.C. Cir. 1999) (upholding award of twenty years front pay in sexual harassment and retaliation action); *Gotthardt v. Amtrak*, 191 F.3d 1148 (9th Cir. 1999) (upholding front pay award of eleven years in hostile environment and sexual harassment claim); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir.) (awarding front pay of seventeen years in an age discrimination claim), *cert. denied*, 506 U.S. 826 (1992); *Fortino v. Quasar* Co., 751 F. Supp 1306 (N.D. Ill. 1990) (awarding plaintiffs from eight to eleven years front pay), *rev'd on other grounds*, 950 F.2d 389 (7th Cir. 1991); *Bates v. Bd. of Edu.*, No. 97-394-SLR, 2000 U.S. Dist LEXIS 4873 (D. Del. March 31, 2000) (awarding front pay of twenty years for retaliation claim after rejecting gender and disability discrimination claims).

In many cases, front pay awards significantly dwarf back pay awards and far surpass the caps set for damages. *See, e.g. Martini*, 178 F.3d at 1399 (upholding award of $153,500 in back and $1,894, 000 in front pay plus punitive damages under Title VII); *Kelley v. Airborne Freight* Corp., 140 F.3d 335 (1st Cir.) (upholding an award of $1,000,000 in front pay under the ADEA and allowing the application of a 2.25 multiplier to front pay award under Massachusetts law), *cert denied*, 525 U.S. 933 (1998); *Passantino v. Johnson & Johnson Consumer Products*,

Inc., 982 F. Supp. 786 (W.D. Wash. 1997) (court allowed to stand a jury award of $100,000 in back pay and $2,000,000 in front pay under the 1991 Act), *aff'd, in part, and vacated in part, and remanded*, 212 F.3d 493 (9th Cir. 2000).[5]

These long term, speculative, and substantial awards of front pay, which can far exceed the caps established by Congress in the 1991 Act, undermine the fundamental purpose of the 1991 Act: to strike an appropriate balance between expanding remedies (*i.e.*, compensatory and punitive damages) while at the same time limiting exposure to the type of astronomical damage awards all too familiar in personal injury litigation.[6] What difference does it make to a small or medium sized business to have its exposure to punitive damages and other compensatory damages capped, if at the same time it is exposed to unlimited awards for front pay? Is a small employer, and the employees who rely on the employer for their livelihood, any better protected from potentially devastating damage awards because other compensatory damages for "future pecuniary losses" are capped, but not front pay?

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[5] Courts have also awarded front pay for purposes other than making the plaintiff whole, including the deterrent effect of such damages in an "egregious" case. *Pease v. Alford Photo Indus.*, 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987) (finding that "an award of front pay in this egregious case will aid in ending the sexual harassment" at the company). With the availability of punitive damages, such awards are unnecessary and, in any event, should be subject to the caps mandated by Congress.

[6] As explained in Section I, this congressional intent is plainly reflected in the statutory language in the legislative history.

Indeed, exempting front pay from the caps on damages would encourage an expansion of litigation informed less by perceived violation of law than by the potential availability of uncapped damages — a result plainly contrary to the congressional intent expressed in the 1991 Act. Only by limiting exposure to front pay, by including it within the type of damages subject to the statutory caps established by the 1991 Act, can the purpose of the 1991 Act be realized.[7]

At the same time, interpreting the cap on damages to apply to front pay damages is consistent with the intent of the 1991 Act to expand remedies for victims of discrimination. By virtue of the 1991 Act, these victims now have available to them, in addition to back pay and equitable remedies, an entire new array of remedies that were previously not available (*e.g.*, damages for emotional distress, damage to reputation, punitive damages for especially egregious conduct). These new remedies are available even if front pay (which also remains available) is subject to the caps.

Accordingly, the intent of the 1991 Act to strike a balance between expanding the type of remedies available to victims of discrimination, and limiting in a reasonable and rational manner the exposure of businesses to unbridled damages awards, can only be realized by including front pay

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[7] At least one Court of Appeals has implicitly recognized that front pay and other forms of compensatory and punitive damages made available under the 1991 Act are similar forms of damages, and compensate for the same injuries, therefore making it inappropriate to award front pay when the other damages "more than adequately compensate [the] plaintiff." *Carey v. Mt. Desert Island Hosp.*, 156 F.3d 31, 41 (1st Cir. 1998).

within the same statutory caps on damages as other compensatory and punitive damages.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals should be affirmed.

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